No. 87 1137

Supreme Court, U.S.
FILED
JAN 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

JAMES D. KIRK,

Petitioner,

vs.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB AND SONS, INC., AND SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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January 4, 1988

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QUESTIONS PRESENTED

I. WHETHER A LITIGANT IS DEPRIVED OF CONSTITUTIONALLY PROTECTED LIBERTY AND PROPERTY INTERESTS WITHOUT DUE PROCESS OF LAW, AND HIS RIGHT TO EQUAL PROTECTION OF THE LAW, WHEN THE STATE COURT OF LAST RESORT, WITHOUT JURISDICTION, DIRECTLY VIOLATES ITS OWN LEGALLY PROMULGATED AND PUBLISHED RULES AND STANDING ORDERS WITHOUT GIVING THE AFFECTED PARTY AN OPPORTUNITY TO RESPOND.

II. WHETHER A PLAINTIFF IN A CIVIL CASE IS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND FAIR ACCESS TO THE COURTS WHEN THE STATE COURT OF LAST RESORT ACCEPTS AS TRUE THE ALLEGATIONS OF AN AFFIRMATIVE DEFENSE AND DISMISSES PLAINTIFF'S COMPLAINT, WITHOUT ALLOWING THE PLAINTIFF AN OPPORTUNITY TO PRESENT EVIDENCE TO A TRIER OF FACT.

III. WHETHER THE COURT VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT WHEN IT IMMUNIZED PHYSICIANS FROM CIVIL LIABILITY FOR FAILING TO PROVIDE A SIMPLE WARNING TO PATIENTS NOT TO DRINK ALCOHOL OR DRIVE AN AUTOMOBILE WHILE TAKING PRESCRIBED MOOD-ALTERING DRUGS, WHERE THE MINIMUM STANDARDS OF THE MEDICAL PROFESSION REQUIRE SUCH A WARNING, AND NO OTHER CLASS OF PROFESSIONALS OR LAY PERSONS HAS EVER BEEN AFFORDED SUCH BLANKET IMMUNITY.

LIST OF PARTIES

The parties to this appeal and to the proceedings below are the Petitioner, JAMES D. KIRK, and the Respondents, MICHAEL REESE HOSPITAL AND MEDICAL CENTER; IRVING H. TRACER, M.D.; HENRY K. FINE, M.D.; E.R. SQUIBB & SONS, INC.; AND SMITHKLINE CLINICAL LABORATORIES, INC. Other parties who appeared below but are not named as Respondents herein include DANIEL McCARTHY, a Defendant at the trial court level but not a party to the appeal; the Pharmaceutical Manufacturers Association, the Illinois Hospital Association, the Metropolitan Chicago Health Care Council and the Illinois Association of Defense Trial Counsel, all of whom filed briefs *amici curiae* in the Supreme Court of Illinois in support of the Respondents' arguments; and the Illinois Trial Lawyers Association, which filed a brief *amicus curiae* in the Supreme Court of Illinois in support of the Petitioner's argument.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

The Petitioner, JAMES D. KIRK, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois, entered in the above-entitled proceeding on October 5, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is reported at 117 Ill.2d 507, 513 N.E.2d 387, and is reprinted in the appendix hereto, p.2a, *infra*.

The opinion of the Appellate Court of Illinois, First Judicial District, is reported at 136 Ill.App.3d 945, 483 N.E.2d 906, and is reprinted in the appendix hereto, p.34a, *infra*.

The pertinent orders of the Circuit Court of Cook County, Illinois, County Department, Law Division (Gomberg, J.) are unpublished, and are reprinted in the appendix hereto, p.52a, *infra*.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on July 13, 1987, reversing the decision of the Appellate Court of Illinois entered on August 28, 1985, which had in turn reversed the trial court's dismissal of Plaintiff's Third Amended Complaint. On October 5, 1987, on denial of rehearing, the Supreme Court of Illinois modified its opinion of July 13, 1987, with no substantive changes. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, Section 1.

STATEMENT OF THE CASE

The Plaintiff-Petitioner, JAMES D. KIRK, filed a six-count complaint for personal injuries, alleging that one DANIEL McCARTHY ("McCarthy"), a Defendant below, received psychiatric treatment at MICHAEL REESE HOSPITAL AND MEDICAL CENTER ("Reese") from Defendants IRVING R. TRACER, M.D. ("Tracer") and HENRY K. FINE, M.D. ("Fine") on August 1, 1978. The doctors ordered that McCarthy be administered two prescription drugs: Prolixin Decanoate, manufactured by Defendant E.R. SQUIBB & SONS, INC. ("Squibb"), and Thorazine, manufactured by Defendant SMITHKLINE CLINICAL LABORATORIES, INC. ("Smithkline"). Hospital personnel injected McCarthy with Prolixin Decanoate and gave him Thorazine for oral consumption.

On the same day, McCarthy was discharged from the Defendant hospital. He then consumed an alcoholic beverage and drove his automobile with Plaintiff as a passenger. The drugs diminished McCarthy's mental and physical abilities, causing him to lose control of his car. As a result, the automobile struck a tree, causing severe and permanent injuries to the Plaintiff.

Counts One through Three of Plaintiff's Third Amended Complaint allege medical negligence against Reese, Tracer and Fine, in that they failed to warn McCarthy prior to his discharge from the hospital that the drugs would impair his physical and mental abilities, although the Defendants knew or should have known of the adverse effects of the drugs.

Counts Four and Five of the complaint, predicated on strict products liability, allege that the prescription drugs were unreasonably dangerous in that Defendants Squibb and Smithkline, as manufacturers, and Defendant Reese, as a dispenser of the medications, failed to provide adequate warnings to the health care providers relative to the adverse effects of the drugs. Count Six of the complaint is not involved in the present appeal.

In a series of unpublished orders, the Circuit Court of Cook County, Illinois, County Department, Law Division, Hon. Myron T. Gomberg, J., dismissed Counts One through Five of the complaint for failure to state a claim, holding as a matter of law that the Defendants owed no duty to the Plaintiff (App. 52a-55a). The Appellate Court of Illinois, Hon. Dom Rizzi, J., reversed and remanded. *Kirk v. Michael Reese Hosp. and Medical Center*, 136 Ill.App.3d 945, 483 N.E.2d 906 (1st Dist. 1985). The appellate court held that the Defendant drug manufacturers had a duty to adequately warn health care providers of the adverse effects of the drugs, and that the Defendant health care providers in turn had a duty to adequately warn their patient that the drugs would impair his mental and physical abilities. Those duties implicitly protect members of the public who would foreseeably be injured by a failure to warn (App. 34a).

Each of the five Defendants filed separate Petitions for Leave to Appeal to the Supreme Court of Illinois. On February 5, 1986, in five separate orders, the supreme court denied leave to appeal on each of the Defendants' several petitions (App. 33a).

On February 24, 1986, in contravention of a standing supreme court order which had been in effect for over six years, the Defendants served Plaintiff's counsel with a document styled, "Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration." Rather than filing said document with the clerk of court in Springfield, Illinois, the Defendants instead sent copies of their purported "motion" directly to each of the seven Justices of the supreme court at their respective local addresses across the state (App. 29a-32a).

On March 18, 1986, the supreme court entered an order as follows: (1) allowing Defendants' motion for leave to file a motion for reconsideration; (2) allowing Defendants' motion for reconsideration; and (3) allowing Defen-

dants' petitions for leave to appeal, which had previously been denied (App.27a-28a). The court's action violated the express terms of the court's own standing order entered November 15, 1979. That standing order barred the filing of motions for reconsideration of orders denying leave to appeal. The standing order further directed the clerk of the supreme court not to accept such motions and to return them unfiled to the tendering parties.

On July 13, 1987, with one justice dissenting and two not participating, the Supreme Court of Illinois, Hon. Daniel P. Ward, J., reversed the decision of the appellate court and reinstated the trial court's dismissal of Counts One through Five of the complaint. On October 5, 1987, on denial of Plaintiff's petition for rehearing, the court's opinion was modified without substantive changes in the majority opinion. *Kirk v. Michael Reese Hosp. and Medical Center*, 117 Ill.2d 507, 513 N.E.2d 387 (1987) (App. 2a).

The court's majority opinion made no reference to the unusual procedural history of the case in the supreme court. Specifically, the opinion made no mention of the fact that Defendants' petitions for leave to appeal had initially been denied. The opinion also failed to mention that the Defendants had filed a purported "motion for leave to file motion for reconsideration and motion for reconsideration." The opinion also failed to mention that the purported "motion" was in violation of the express terms of the November 15, 1979 standing order. The opinion also failed to mention that the Defendants mailed copies of their purported "motion" directly to each of the seven justices at their local addresses across the state, rather than filing same with the court clerk as required by law. See Illinois Supreme Court Rule 361, Ill.Rev.Stat. Ch. 110A, Par. 361.

The majority opinion also failed to mention that the court had simultaneously granted Defendants' motion for leave to file a motion for reconsideration, their motion for reconsideration, and their petitions for leave to appeal,

without allowing Plaintiff an opportunity to respond to Defendants' motion for reconsideration. The opinion also failed to mention that by hearing and ultimately granting such motions, the court had violated the express terms of its own standing order originally entered on November 15, 1979. The majority's sole reference to the procedural posture of the case was an oblique recital that the Defendants "filed petitions for leave to appeal in this court under our Rule 315(a) [103 Ill.2d R. 315(a)]; we allowed the petitions and consolidated the five appeals." 513 N.E.2d at 390.

In its decision affirming the trial court's dismissal of Plaintiff's complaint, the supreme court accepted as true the allegations of an affirmative defense claimed by the Defendant pharmaceutical manufacturers based on the "learned intermediary" doctrine. That doctrine holds that a drug manufacturer who adequately warns a health care provider of the adverse effects of its product will be absolved of liability to persons injured by the health care provider's failure to warn his patient. In the present case, the supreme court effectively held that the mere assertion of the learned intermediary defense by a pharmaceutical manufacturer is sufficient to mandate dismissal of a complaint alleging that a pharmaceutical manufacturer failed to adequately warn of the adverse effects of its drugs, without regard to the existence of factual questions relative to whether such warnings were actually given, or if so, the adequacy thereof.

The supreme court further held that public policy requires special protection for physicians and hospitals whose legal misconduct causes injury to foreseeable victims. Such extraordinary protection applies to health care providers even where their wrongful acts violate the very standards applicable to members of the medical profession. According to the supreme court, a procedural change in medical negligence law enacted by the Illinois General Assembly in 1986 was sufficient to retroactively change

the substantive law applicable to persons injured by wrongful acts of doctors and hospitals in 1978. Because the state legislature has recently imposed certain procedural requirements on persons bringing new medical malpractice lawsuits in the future, the supreme court held that for reasons of public policy, doctors should no longer be legally required to warn patients not to consume alcohol or drive a car while under the influence of mood-altering prescription drugs. According to the supreme court, a physician who fails to convey such a simple warning should be immune from liability to persons injured as a result of a patient's consumption of alcohol or operation of a motor vehicle while using such prescribed medication.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DEPRIVED OF CONSTITUTIONALLY PROTECTED LIBERTY AND PROPERTY INTERESTS WITHOUT DUE PROCESS OF LAW, AND WAS DENIED EQUAL PROTECTION OF THE LAW, WHEN THE ILLINOIS SUPREME COURT DIRECTLY VIOLATED ITS OWN RULES BY RECONSIDERING A CASE WHICH HAD ALREADY BEEN FINALLY ADJUDICATED AND FOR WHICH THE COURT HAD NO JURISDICTION FOR FURTHER PROCEEDINGS, WITHOUT GIVING PETITIONER AN OPPORTUNITY TO RESPOND TO RESPONDENTS' MOTION FOR RECONSIDERATION, WHICH WAS ITSELF IN VIOLATION OF STATE LAW.

A standing order of the Illinois Supreme Court, in force since November 15, 1979, provides in pertinent part as follows:

> The rules of this court make no provision for filing of a motion for reconsideration of an order of this court denying a petition for leave to appeal or petition for rehearing. The Clerk of the Supreme Court is directed not to accept or file such motions and is further directed to return them to the tendering party or attorney.

The obvious import of this rule is that no petition for reconsideration of an order denying a petition for leave to appeal should be presented to the state supreme court.

It might be argued that a technical difference somehow exists between a "motion for leave to file" a petition for reconsideration and the petition itself. Nevertheless, in all practical respects a motion for "leave to file" the petition is, in reality, the same as the petition itself, whether the motion effectively constitutes the petition or consists merely of a sentence attached to the petition. In either event, the two are identical.

That both the intent and the effect of the two pleadings are identical is evidenced in the instant case, in which the state supreme court simultaneously granted Defendants' motion "for leave to file a petition for reconsideration," their "petition for reconsideration," and their petition for leave to appeal, without affording Plaintiff an opportunity to respond to the petition for reconsideration after its filing had been allowed. It is also curious that the supreme court's published opinion on the merits omits any reference to the Byzantine procedural history of this case. If one were to read the court's published opinion without having independent knowledge of the manner in which the court agreed to hear the case in the first instance, one would be unaware that the court initially denied leave to appeal and later reversed itself in violation of its own rules. Plaintiff submits that the court's actions deprived James Kirk of his constitutionally protected liberty and property interests without due process of law, and denied him equal protection of the law, in violation of the Fourteenth Amendment to the United States Constitution.

The Illinois Supreme Court has promulgated and published rules and orders governing appellate procedure. These rules provide notice to litigants and members of the bar regarding the manner in which appeals are perfected. For example, Illinois Supreme Court Rule 367 provides for a rehearing of an appeal only after a reviewing court issues an opinion. Ill.Rev.Stat., Ch. 110A, Par. 367. The Rule "does not allow petitions for rehearing to be filed from decisions denying petitions for leave to appeal." Smith-Hurd Ann. Stat., Ch. 110A, Par. 367, Historical and Practice Notes at 309. Similarly, Rule 361, which governs motion practice in the reviewing courts, was not intended to permit motions not otherwise recognized by law. *People v. Barker*, 59 Ill.2d 201, 205-206, 319 N.E.2d 810, 812 (1974). Furthermore, denial of a petition for leave to appeal is a final adjudication of the case, leaving no jurisdiction for further proceedings. *See Rubin v. Kohn*, 344 Ill. 166, 172, 176 N.E. 259 (1931).

This case involves fundamental rights arising under the Constitution of the United States. The legal principal underlying the due process and equal protection violations is whether a branch of government, in the case the state supreme court, should follow its own rules or may arbitrarily create or destroy claims. This Court addressed the issue in a somewhat different context in *United States v. Nixon*, 418 U.S. 683 (1974). In *Nixon*, the President of the United States disobeyed a federal regulation allowing the Watergate special prosecutor to contest a claim of executive privilege. Pointing out that the regulation in question had the force of law, this Court held that

> [a]s long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of three branches of government is bound to respect and to enforce it.

Id., at 696. In other words, the branches of government are "bound to respect and to enforce" their own rules.

Similarly, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Illinois Supreme Court had refused to hear a case arising under the former Illinois Fair Employment Practices Act because it was not timely processed by a state agency. This Court held that the claimant had a constitutionally protected liberty and property interest in his state-created claim, and that he was unlawfully deprived of that protected interest without due process of law by the court's refusal to hear the case.

The instant case is analogous to both *Nixon* and *Logan*. Here, the state supreme court failed to follow and enforce its own rules. Plaintiff had a protected interest in seeing that the state court system follow its own rules when adjudicating his case. *See Nixon* at 696. Plaintiff likewise had a state-created property interest in the final judgment of the intermediate-level appellate court, for which leave to appeal had been denied by the state supreme court. *See Logan*, at 430; *Cf. Rubin v. Kohn*, 344 Ill. at 172. At a bare

minimum, Plaintiff should have been afforded the opportunity to respond in writing to Defendants' motion for reconsideration, once the supreme court granted "leave to file" that motion. Instead, the court granted "leave to file" the motion and simultaneously granted the motion itself. Once a person establishes a constitutionally protected interest, the Fourteenth Amendment defines the minimum procedural requirements which protect that interest. *Logan*, at 430. The Illinois Supreme Court therefore deprived James Kirk of his constitutionally protected liberty and property interests, and that deprivation was without due process of law.

Furthermore, the supreme court by its action created two classes of lawyers and litigants. The first class consists of lawyers who read, understand and follow the published opinions, rules and orders of court, and their clients. The second class consists of those lawyers who do not read, understand or follow published opinions, rules and orders of court, or who may circumvent the rules by utilizing occult procedural maneuvers known only to a few select "in" members of the bar, and their clients. Such a classification is constitutionally impermissible, as it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Like other branches of government, courts should be expected to follow their own rules. A failure by the highest appellate tribunal of a state to follow its own rules can only erode public confidence in the judicial system and encourage sloppy, incompetent practice by lawyers. The Illinois judiciary and bar are now struggling to maintain public credibility in the face of the well-publicized Operation Greylord investigation. It is therefore vital, now more than ever before, that the judicial branch of state government take care to respect and enforce its own rules.

The Illinois Supreme Court has now developed a pattern of reconsidering final denials of leave to appeal, in violation of its own rules. In *Johnson v. Colley*, 111 Ill.2d 468, 490 N.E.2d 685 (1986), *cert denied*, ___ U.S. ___, 107 S.Ct. 113, 93 L.Ed.2d 60 (1986), the supreme court violated its own standing order by granting a motion for reconsideration of its denial of a petition for leave to appeal. In *Johnson*, the court examined its own action and found that it did not act unconstitutionally in granting a motion for reconsideration which violated the court's own rules, and reversing the appellate court after having first denied leave to appeal. Thus, the case at bar is at least the second in a series of cases in which the court has effectively abrogated its own legally promulgated and published rules of procedure without notice to members of the bar. If the state supreme court in fact wishes to change the principal that denials of leave to appeal in Illinois constitute final judgments, and instead establish a new procedure whereby the court can reconsider a prior denial of a petition for leave to appeal, the court should change its own rules and vacate its standing order on the subject so as to provide notice to the bench and bar. Otherwise, each time the court reconsiders prior denials of petitions for leave to appeal, it unconstitutionally deprives the litigants who prevailed below of state-created liberty and property rights, and denies equal protection of the law to that class of attorneys and litigants who choose to follow the legally established supreme court rules.

II. PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND FAIR ACCESS TO THE COURTS WHEN THE STATE SUPREME COURT ACCEPTED AS TRUE THE ALLEGATIONS OF AN AFFIRMATIVE DEFENSE AND DISMISSED PLAINTIFF'S THIRD AMENDED COMPLAINT WITHOUT ALLOWING PLAINTIFF AN OPPORTUNITY TO PRESENT EVIDENCE TO A TRIER OF FACT IN SUPPORT OF THE ALLEGATIONS OF HIS COMPLAINT.

In spite of the fact that the instant case came before the state supreme court on a motion to dismiss a complaint for failure to state a claim, rather than on a motion for summary judgment, the court effectively accepted as true the allegations of Defendants Squibb and Smithkline regarding the existence and adequacy of certain warnings purportedly conveyed by them to the Defendant health care providers. Those pharmaceutical Defendants had raised the "learned intermediary" doctrine as an affirmative defense of sorts. That doctrine absolves drug manufacturers of civil liability if they adequately warn health care providers of the side effects of prescription drugs.

However, the state supreme court relied only on a bare allegation of a "learned intermediary" defense contained in a motion to dismiss to completely absolve the drug manufacturer Defendants, with no opportunity for the trier of fact to determine whether warnings were in fact given, and if so, the adequacy thereof. According to the court, the pharmaceutical Defendants should not

> have reasonably foreseen that their drugs would be dispensed without warnings by the physicians . . . This sequence would be triggered by an element that we have determined that the pharmaceutical companies did not have to foresee under the circumstances shown here: *that the drugs would be dispensed without the warnings that the two companies provided to the physicians.*

Kirk v. Michael Reese Hosp. and Medical Center, 117 Ill.2d 507, 513 N.E.2d 387, 394 (1987) (emphasis supplied). The court's analysis would be correct only if Smithkline and Squibb had shown *as a matter of law* that they gave adequate warnings to the "learned intermediaries," i.e., the doctors, in the first instance. Only then could the "learned intermediary" doctrine absolve the drug companies of liability to persons injured by a physician's failure to warn. Yet nothing in the Record demonstrates that any such warnings were even given in the case at bar, let alone whether the warnings were adequate as a matter of law. Nor was Plaintiff given an opportunity to dispute that fact.

Plaintiff submits that the liberty interest in access to the courts, protected by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, includes the right to have a trier of fact, whether judge or jury, determine disputed questions of fact in a civil case. No court has the right to accept as true the bare allegations of an affirmative defense and dismiss a Plaintiff's complaint without affording him the opportunity to present evidence in support of his claim.

The right to present evidence is essential to the fair hearing required by the due process clause. *Jenkens v. McKeithen*, 395 U.S. 411 (1969). Due process is absent if a party is deprived of liberty or property without evidence having been presented in accordance with established rules. *Collins v. Superior Court*, 150 Cal.App.2d 354, 310 P.2d 103 (1957). Mere fiat may not take the place of factfinding in the determination of issues involving liberty or property. *See Manley v. Georgia*, 279 U.S. 1 (1929). The right under the due process clause to a full hearing includes the right of the litigants to introduce evidence and have findings based thereon. *Baltimore & O. R.R. Co. v. United States*, 298 U.S. 349 (1936); *Louisville & N. R.R. Co. v. Finn*, 235 U.S. 601 (1915); *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510

(1912). Where disputed factual questions exist, due process implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence, a conclusion from the evidence as to where the truth lies, the application of law to fact, and the rendition of judgment accordingly. *Cf., in re Estate of Buchman*, 123 Cal.App.2d 546, 267 P.2d 73 (1954). The "fair trial" that is essential to due process requires that the finder of fact must know, consider, and appraise the evidence. *LeStrange v. Berkeley*, 210 Cal.App.2d 313, 26 Cal.Rptr. 550 (1962).

In the present case, the supreme court's opinion does acknowledge that in ruling on a motion to dismiss for failure to state a claim, all well-pleaded facts must be taken as true according to Illinois law. 513 N.E.2d at 390. No serious doubt ever existed that Plaintiff's complaint sufficiently alleged a failure by Squibb and Smithkline to adequately warn the physicians relative to the tendency of their products to impair a patient's physical and mental capacities. Plaintiff has a right to prove before a trier of fact that the warnings given by Squibb and Smithkline, if any, were inadequate. The unfairness of depriving Plaintiff of that right was recognized by Justice Simon's stinging dissent in the case *sub judice*, when he wrote that "[t]he majority, in assuming the warnings were adequate, deprives the plaintiff of his right to present evidence to a trier of fact relative to the existence and sufficiency of the warnings." 513 N.E.2d at 402 (Simon, J., dissenting). Similarly, the Illinois Appellate Court correctly noted that

> the sufficiency of the warnings is not resolved judicially . . . , but *remains a question to be resolved by the trier of the fact* . . . Here, since the counts against the drug manufacturers were dismissed because of a failure to state a cause of action (Ill.Rev.Stat.1983, Ch. 110, Par. 2-615), *the factual question as to the adequacy of warnings that allegedly were included as package inserts or that may have been given by the medical profession is not before us.*

Kirk v. Michael Reese Hosp., 136 Ill.App.3d 945, 483 N.E.2d 906, 911, n.2 (1st Dist. 1985) (emphasis supplied).

By accepting the Defendants' unsubstantiated allegations as true, the state supreme court effectively decided a disputed factual issue on the basis of unauthenticated documents and baseless arguments of counsel, without giving Plaintiff the opportunity to respond under some recognized rule of procedure. No affidavits were ever filed by the Defendants. No opportunity was ever provided to Plaintiff to file counteraffidavits. Even so, it has never been shown that Squibb or Smithkline ever gave any warnings at all to the doctors, let alone whether such warnings were adequate to apprise the medical profession of the side effects of the Defendants' drugs. Indeed, Dr. Tracer, the physician who treated Daniel McCarthy, himself *admitted* at page 23 of his Appellate Court brief that he was unaware that the drugs would diminish his patient's mental and physical capacities. Tracer's admission constitutes evidence that the warnings given by the pharmaceutical manufacturers, if they were given at all, were inadequate to apprise Tracer, the "learned intermediary," of the dangerous propensities of the drugs. Yet the court barred Plaintiff from presenting such evidence to a trier of fact. In short, the court's action in dismissing Plaintiff's complaint against the drug manufacturers without allowing a judge or jury to assess whether adequate warnings were given deprives Plaintiff of his liberty interest under the Due Process Clause in having a fair trial and fair access to the courts of this state.

III. NO LEGITIMATE BASIS EXISTS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT FOR IMMUNIZING A PHYSICIAN FROM CIVIL LIABILITY TO PERSONS INJURED AS A RESULT OF HIS FAILURE TO WARN PATIENTS NOT TO DRINK ALCOHOL OR OPERATE MOTOR VEHICLES WHILE TAKING MOOD-ALTERING DRUGS PRESCRIBED BY THAT PHYSICIAN, AS THE MINIMUM STANDARDS OF THE MEDICAL PROFESSION REQUIRE SUCH A WARNING, AND NO OTHER CLASS OF PROFESSIONALS OR LAY PERSONS HAS EVER BEEN ENTITLED TO SUCH BLANKET IMMUNITY.

The court's ruling effectively insulates physicians from civil liability for failing to comply with the bare minimum standard for practicing medicine. A doctor who prescribes psychotropic drugs now has no legal obligation to convey a thirty-second warning to the patient not to operate a motor vehicle or consume alcohol while under the influence of mood-altering medication. The doctor has virtual license to turn his patient into a human time bomb whose victims have no legal recourse in the civil justice system. Certainly a patient bears no liability to persons injured when he drives a car while taking such prescribed drugs, as he has not been made aware of any side-effects. Yet the supreme court saw fit to create a privileged class consisting only of members of the medical profession.

According to the logic of the court's opinion, physicians now have complete freedom to drug patients and turn them loose upon an unsuspecting society, bearing no cost of the damage which is almost certain to result. The creation of such a privileged class bars innocent victims of medical negligence from obtaining redress in the civil courts of this land, thereby depriving such persons of their fundamental right to fair access to the courts. Under the Equal

Protection Clause, classifications which impinge on fundamental freedoms must be not merely rationally related to a valid public purpose, but must be necessary to the achievement of a compelling state interest. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In the present case, no such compelling state interest is present. Moreover, even if this Court finds that no fundamental right is implicated by the extension of immunity to doctors who injure innocent persons by their failure to warn patients of the side effects of prescribed drugs, Petitioner nevertheless submits that the creation of such a privileged class in our legal system cannot be justified even by an articulable rational basis.

The supreme court's ruling was not based on any interpretation of the common law of torts; indeed, the court rejected the unanimous view held by every court in the land which has considered the issue. Published opinions from four states and two federal courts have all held that a doctor who fails to warn his patient of the mood-altering side effects of prescribed medication will be liable in tort to persons injured as a result of his failure to warn. *See Freeze v. Lemmon*, 210 N.W.2d 576 (Iowa 1973); *Kaiser v. Suburban Transp. Sys.*, 398 P.2d 14 (Wash. 1965); *Welke v. Kuzilla*, 375 N.W.2d 405 (Mich.App. 1985); *Duval v. Goldin*, 362 N.W.2d 274 (Mich.App. 1984); *Gooden v. Tips*, 651 S.W.2d 364 (Tex.App. 1983); *Watkins v. United States*, 489 F.2d 214 (5th Cir. 1979); *Lipari v. United States*, 497 F.Supp. 185 (D. Neb. 1980); *compare Irwin v. Town of Ware*, 467 N.E.2d 1292 (Mass. 1984). By this discussion, Plaintiff does not intend to propose a "constitutionalization" of the common law of torts; rather, Plaintiff wishes only to illustrate that the supreme court's decision in the instant case is beyond the bounds of reason. The sole basis stated by the court for its decision to alleviate doctors of the duty to warn patients about prescribed medication is that the Illinois General Assembly established certain new procedures for filing future medical malpractice lawsuits

beginning in 1986. From these procedural changes, the supreme court inferred a public policy to retroactively insulate doctors from civil liability. The court's decision fails to enunciate a compelling state interest sufficient to justify such an intrusion upon the fundamental right of the citizenry to fair access to the civil justice system.

Moreover, even if the right of the people to fair access to the courts is not of a "fundamental" nature, as that term has been defined under the Equal Protection Clause, Plaintiff nevertheless submits that the alleged "public policy" articulated by the court and retroactively applied to this case is vastly insufficient even to overcome the threshold of "mere rationality" necessary for any government classification to withstand constitutional scrutiny under the Equal Protection Clause.

Conclusion

For all the foregoing reasons, Petitioner respectfully prays that this Honorable Court issue a Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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January 4, 1988

APPENDIX

ILLINOIS SUPREME COURT
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October 5, 1987

Mr. Dario Garibaldi
Horwitz and Associates
180 N. LaSalle St.
Chicago, IL 60601

Nos. 62700 – James D. Kirk, appellee, v. Michael Reese
62701 Hospital and Medical Center, et al., etc.,
62702 appellants. Appeal, Appellate Court, First
62703 District.
62704
Cons.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Opinion modified on denial of rehearing.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on October 15, 1987.

OPINION MODIFIED ON DENIAL OF REHEARING OCTOBER 5, 1987.

ORIGINAL OPINION FILED July 13, 1987.

Docket Nos. 62700, 62701, 62702, 62703 & 62704 cons.–Agenda 6–January 1987.

JAMES D. KIRK, Appellee, v. MICHAEL REESE HOSPITAL AND MEDICAL CENTER *et al.*, Appellants.

JUSTICE WARD delivered the opinion of the court:

The five causes consolidated in this appeal arise from one personal injury action. The plaintiff, James D. Kirk, filed a six-count complaint in the circuit court of Cook County against six defendants, five of whom are involved in this appeal. The defendants moved to dismiss the plaintiff's third amended complaint for failure to state a cause of action; the trial court dismissed the action against five of the defendants. On the plaintiff's appeal from the dismissal, the appellate court reversed the dismissals of the five counts and remanded for further proceedings. The defendants filed petitions for leave to appeal in this court under our Rule 315(a) (103 Ill. 2d R. 315(a)); we allowed the petitions and consolidated the five appeals for review.

Because this appeal is before the court on the defendants' motion to dismiss, all well-pleaded facts will be regarded as true. (*Katz v. Belmont National Bank* (1986), 112 Ill. 2d 64, 67; *Mein v. Masonite Corp.* (1985), 109 Ill. 2d 1, 7.) The plaintiff was injured August 1, 1978, while a passenger in a car driven by Daniel McCarthy when the car struck a tree. McCarthy had been a psychiatric patient at Michael Reese Hospital and Medical Center (hereafter Michael Reese), where he was treated by Dr. Irving H. Tracer and Dr. Henry K. Fine. The plaintiff alleges that Dr. Tracer was rendering medical treatment to McCarthy in the capacity of an agent, servant, or employee of Dr. Fine. The plaintiff alleges that Dr. Tracer, Dr. Fine, or their agents ordered prescription drugs in

treating McCarthy. The drug Thorazine, which is manufactured by the defendant SmithKline Beckman Corp. (hereafter SmithKline), had been prescribed and McCarthy also had been given Prolixin Decanoate, which is manufactured by the defendant E.R. Squibb & Sons, Inc. (hereafter Squibb), on the day he was discharged from the hospital. McCarthy, following his discharge from Michael Reese, consumed an alcoholic drink. Later in the day, Kirk was a passenger in the car driven by McCarthy and was injured when the car left the roadway and struck a tree in Chicago Heights.

In count I of the plaintiff's third amended complaint, he seeks recovery from Michael Reese on the theory that the hospital negligently failed to adequately warn McCarthy that the prescribed drugs administered would diminish his physical and mental abilities. Counts II and III seek recovery from Drs. Tracer and Fine, respectively, on the theory that the physicians knew or should have known that the drugs would diminish McCarthy's mental abilities and that they negligently failed to warn McCarthy. Counts IV and V, both of which seek recovery against Michael Reese, as well as Squibb and SmithKline, respectively, are based on a strict liability theory and allege that the drugs were in an unreasonably dangerous condition because the manufacturers failed to adequately warn of the drugs' dangerous propensities, that is, that the drugs would diminish the physical and mental abilities of the user, McCarthy. Count VI seeks recovery from McCarthy for his alleged negligence in operating the car. The trial court, after memoranda were filed and numerous arguments were heard, granted the motions of the hospital, two doctors, and two drug companies to dismiss. The trial court also denied the plaintiff's oral motion to file a fourth amended complaint. Count VI against McCarthy was not dismissed and is not involved in this appeal.

The appellate court, with one justice dissenting, reversed and remanded the dismissed counts for trial. (136 Ill. App. 3d 945.) The appellate court, considering whether the defendants owed a duty to the plaintiff as but a single issue, held that the doctors, hospital, and drug manufacturers each had a duty to adequately warn McCarthy of the adverse effects of the drugs, which duty, the court stated, was implicitly extended to cover members of the public who may be injured as a proximate cause of the failure to adequately warn (136 Ill. App. 3d 945, 952). Too, the appellate court held the hospital was open to liability on a strict liability theory for failure to warn McCarthy of the effects of the prescribed drugs. As stated, the five defendants filed petitions for leave to appeal; their petitions were initially denied, but upon reconsideration, they were allowed and consolidated for review. Briefs *amici curiae* have been filed by five organizations. The Illinois Trial Lawyers Associations, as *amicus*, supports the plaintiff's arguments that the appellate court decision should be affirmed. Another *amicus*, the Pharmaceutical Manufacturers Association, supports the arguments of defendants SmithKline and Squibb. The Illinois Hospital Association and Metropolitan Chicago Healthcare Council, in a joint *amicus* brief, support Michael Reese's views and particularly argue against liability being imposed toward the hospital under strict liability principles. The Illinois Association of Defense Trial Counsel generally argues to reverse the appellate court's decision and specifically supports the drug manufacturers' views.

Because we are reviewing the dismissal of a complaint for failure to state a cause of action, we must determine the legal sufficiency of the complaint. (*Katz v. Belmont National Bank* (1986), 112 Ill. 2d 64, 67.) Pleadings are to be liberally construed with a view to doing justice between the parties (Ill. Rev. Stat. 1985, ch. 110, par. 2–603(c); *Pelham v. Griesheimer* (1982), 92 Ill. 2d 13, 17), but that does not lessen the obligation of the plaintiff to set out

facts necessary for recovery under the theory asserted in the complaint. (*Teter v. Clemens* (1986), 112 Ill. 2d 252, 256-57.) Section 402A of the Restatement (Second) of Torts (1965), which this court has previously followed (*Suvada v. White Motor Co.* (1965), 32 Ill. 2d 612), would subject a seller or manufacturer of a product to liability if the product is sold "in a defective condition unreasonably dangerous" to an ultimate user or consumer who is injured by the product. It is recognized that a failure to warn of a product's dangerous propensities may serve as the basis for holding a manufacturer strictly liable in tort. (*Hammond v. North American Asbestos Corp.* (1983), 97 Ill. 2d 195, 206; *Woodill v. Parke Davis & Co.* (1980), 79 Ill. 2d 26, 29; Restatement (Second) of Torts sec. 402A, comment *j* (1965).) A prescription drug may be deemed unreasonably dangerous because of the absence of an adequate warning accompanying the product as the product may be "unavoidably unsafe" without such warning. Restatement (Second) of Torts sec. 402A, comment *k* (1965); *Lawson v. G.D. Searle & Co.* (1976), 64 Ill. 2d 543, 550-51.

The plaintiff asserts that, while the class of persons to whom the warning is required to be given may be very limited, the class of persons to whom the duty is owed includes the public generally. He contends also that the appellate court holding does not abolish or diminish the "learned intermediary" doctrine. The plaintiff, although he argued at the trial proceedings that the pharmaceutical companies owed a duty to warn the patients who use the drugs, now accepts Squibb's and SmithKline's position that adequate warnings are to be given to physicians only and not to the public generally. Our appellate court has previously adopted the learned intermediary doctrine (*Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App. 3d 540; (applying Texas law); *Hatfield v. Sandoz-Wander, Inc.* (1984), 124 Ill. App. 3d 780 (applying Indiana law); *Eldridge v. Eli Lilly & Co.* (1985), 138 Ill. App. 3d 124), but this court had not directly considered the issue. The rule, as adopted in numerous

jurisdictions, provides that manufacturers of prescription drugs have a duty to warn prescribing physicians of the drugs' known dangerous propensities, and the physicians, in turn, using their medical judgment, have a duty to convey the warnings to their patients (*Hatfield v. Sandoz-Wander, Inc.* (1984), 124 Ill. App. 3d 780, 788; *Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App. 3d 540, 561; *Hoffman v. Sterling Drug, Inc.* (3rd Cir. 1973), 485 F.2d 132, 142; *Crocker v. Winthrop Laboratories* (Tex. 1974), 514, S.W.2d 429; *Stone v. Smith, Kline & French Laboratories* (11th Cir. 1984), 731 F.2d 1575, 1579; *Stevens v. Parke, Davis & Co.* (1973), 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45; *Terhune v. A.H. Robins Co.* (1978), 90 Wash. 2d 9, 577 P.2d 975; see also W. Prosser & W. Keeton, The Law of Torts sec. 96, at 688 (5th ed. 1984.) The rationale for the doctrine was stated in a holding concerning Thorazine, one of the drugs involved here, in *Stone v. Smith, Kline & French Laboratories* (11th Cir. 1984), 731 F.2d 1575, 1579:

> " 'We cannot quarrel with the general proposition that where *prescription* drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use. This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn foreseeable ultimate users of dangers inherent in his products. See Restatement (Second) of Torts, Section 388 (1965). Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, and individualized medical judgment bottomed on a knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent

> drugs sold over the counter, in selling prescription drugs are required to warn only the prescribing physician, who acts as a "learned intermediary" between manufacturer and consumer.' " (Emphasis in original.) 731 F.2d 1575, 1579-80, quoting *Reyes v. Wyeth Laboratories* (5th Cir. 1974), 498 F.2d 1264, 1276, *cert. denied* (1974), 419 U.S. 1096, 42 L. Ed. 2d 688, 95 S. Ct. 687.

The drug manufacturer generally communicates warnings relating to prescription drugs to the medical profession through package inserts, the Physician's Desk Reference, "Dear Doctor" letters, detailmen, and through other measures. (*Sterling Drug, Inc. v. Yarrow* (8th Cir. 1969), 408 F.2d 978; *Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App. 3d 540, 562; *Parke-Davis & Co. v. Stromsodt* (8th Cir. 1969), 411 F.2d 1390.) The doctor, functioning as a learned intermediary between the prescription drug manufacturer and the patient, decides which available drug best fits the patient's needs and chooses which facts from the various warnings should be conveyed to the patient, and the extent of disclosure is a matter of medical judgment. (*Hatfield v. Sandoz-Wander, Inc.* (1984), 124 Ill. App. 3d 780, 788; *Eldridge v. Eli Lilly & Co.* (1985), 138 Ill. App. 3d 124, 127; *Jones v. Irvin* (S.D. Ill. 1985), 602 F. Supp. 399, 402.) As such, we believe the learned intermediary doctrine is applicable here and that there is no duty on the part of manufacturers of prescription drugs to directly warn patients. Certainly, if the manufacturer of a prescription drug has no duty to directly warn the user of the drug of possible adverse effects, it has no duty to warn a nonuser as Kirk.

The plaintiff also argues that the warnings given to the two doctors here were inadequate, thus making the prescription drugs "unreasonably dangerous." This contention, however, is premature and puts the cart before the horse. As we determined in *Winnett v. Winnett* (1974), 57 Ill. 2d 7, 10, whether a product is unreasonably dangerous for its intended uses "is simply not a relevant consideration unless plaintiff is a person entitled to the

protections afforded by the concepts of strict-tort-liability actions against manufacturers." It is recognized that a legal duty is imposed under strict liability upon those in the original production chain of a product to the benefit of those individuals to whom injury from a defective product may reasonably be foreseen. (*Court v. Grzelinski* (1978), 72 Ill. 2d 141, 146.) Those individuals may include not only the ultimate users or consumers, but also may include persons outside the purchasing chain of the product (Restatement (Second) of Torts sec. 402A, comment *l* (1965); *Court v. Grzelinski* (1978), 72 Ill. 2d 141, 146 (holding that, to the extent a fireman is a person to whom injury from the product may reasonably be foreseen, he may recover under products liability, even though his injury occurred while fighting a fire in the course of his employment); *Lewis v. Stran Steel Corp.* (1974), 57 Ill. 2d 94, 96.) In *Winnett*, we said:

> "In our judgment the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen and only those situations where the product is being used for the purpose for which it was intended or for which it is reasonably foreseeable that it may be used. Any other approach to the problem results in making the manufacturer and those in the chain of product distribution virtual insurers of the product, a position rejected by this court in *Suvada*." 57 Ill. 2d 7, 11.

Winnett determined that whether a plaintiff is entitled to the protection afforded by the concepts of strict tort liability depends on whether the alleged conduct was reasonably foreseeable. "A foreseeability test, however, is not intended to bring within the scope of the defendant's liability every injury that might possibly occur." (57 Ill. 2d 7, 12; see also *Riordan v. International Armament Corp.* (1985), 132 Ill. App. 3d 642 (no duty on part of the handgun manufacturer to warn consumers of illegal handgun uses for the benefit of a shooting victim).) Questions of foreseeability

are ordinarily for a jury to resolve, but where the facts alleged in a complaint on their face demonstrate that the plaintiff would never be entitled to recover, that complaint is properly dismissed. (*Winnett v. Winnett* (1974), 57 Ill. 2d 7, 13.) We believe that facts alleged in counts IV and V against Squibb and SmithKline demonstrate on their face that plaintiff would never be entitled to recover. As such, it cannot be said that Squibb and SmithKline demonstrate on their face that plaintiff would never be entitled to recover. As such, it cannot be said that Squibb and SmithKline should have reasonably foreseen that their drugs would be dispensed without warnings by the physicians, that the patient would be discharged from the hospital, drink alcohol, drive a car, lose control of his car, hit a tree, and injure the passenger, Kirk, on the same day. This sequence would be triggered by an element that we have determined that the pharmaceutical companies did not have to foresee under the circumstances shown here: that the drugs would be dispensed without the warnings that the two companies provided to the physicians. As this court has noted, "[s]trict liability is not the equivalent of absolute liability. There are restrictions imposed upon it." (*Woodill v. Parke Davis & Co.* (1980), 79 Ill. 2d 26, 37; see also *Coney v. J.L.G. Industries, Inc.* (1983), 97 Ill. 2d 104, 111.) The trial court properly dismissed the two strict liability counts against Squibb and SmithKline.

The pharmaceutical companies say that the trial court properly denied the plaintiff's oral request to file a fourth amended complaint. The plaintiff asks that we grant leave to amend under Rule 362 (87 Ill. 2d R. 362(f)). A trial court has broad discretion in determining whether to allow amendments to a complaint. (*Deasey v. City of Chicago* (1952), 412 Ill. 151, 156-57; *Saldana v. Wirtz Cartage Co.* (1978), 74 Ill. 2d 379, 390.) The plaintiff's proposed amended complaint does not appear in the record; the plaintiff's failure to make it a part of the record waives his right to have this court review the trial court's denial

of his motion. *Teter v. Clemens* (1986), 112 Ill. 2d 252, 260-61; *Austin Liquor Mart, Inc. v. Department of Revenue* (1972), 51 Ill. 2d 1, 8.

Turning to the portions of the complaint charging Michael Reese, the plaintiff posits liability in counts I, IV, and V against the hospital on two theories: strict liability and negligence. Under the strict liability counts, the plaintiff alleges that the products–the prescription drugs–were made unreasonably dangerous through the hospital's alleged failure to warn the patient, McCarthy, of their possible adverse effects. The plaintiff correctly states that strict tort liability may be imposed upon sellers and those in the chain of distribution, as well as manufacturers, for their role in placing a defective product into the stream of commerce. (*Crowe v. Public Building Com.* (1978), 74 Ill. 2d 10, 13; *Cunningham v. MacNeal Memorial Hospital* (1970), 47 Ill. 2d 443.) The plaintiff bases his strict liability count against the hospital on the hospital's role in the chain of distribution, "standing between the manufacturer and the doctor," and also as the supplier of the prescription drug to McCarthy. For the reasons discussed concerning the pharmaceutical companies, we believe there is no duty here to this nonpatient, nonuser of the product, and, as such, Kirk is not a plaintiff entitled to protection under strict liability principles. Too, in *Dubin v. Michael Reese Hospital & Medical Center* (1980), 83 Ill. 2d 277, and *Greenberg v. Michael Reese Hospital & Medical Center* (1980), 83 Ill. 2d 282, this court held that a hospital cannot be held strictly liable for its employees' decision to administer X-ray treatments for tonsillitis because such an allegation is directed at the conduct of the health care professional rather than the nature of the particular product. An action directed at the appropriateness of X-radiation treatment is already afforded a sufficient remedy in the law of negligence. (83 Ill. 2d 282, 290.) As we discussed earlier, the learned intermediary doctrine requires that the pharmaceutical company *warn the physician* of the known

adverse effects of a particular prescription drug. The doctor, exercising his medical judgment, decides if drug therapy is an appropriate treatment for a psychiatric patient and decides which drugs will best suit his patient's needs. As was stated in *Stone v. Smith, Kline & French Laboratories* (11th Cir. 1984), 731 F.2d 1575, 1579, "This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn foreseeable ultimate users of dangers inherent in his products." We must also recognize that "[t]he marketing situation as regards prescription drugs and vaccines is a unique one.

* * * The producer's basic responsibility in this area is to provide adequate warnings to physicians. It is the physician who is in the best position to decide when to use and how and when to inform his patient regarding risks and benefits pertaining to drug therapy." (W. Prosser & W. Keeton, The Law of Torts sec. 96, at 688 (5th ed. 1984).) As such, the manufacturer is only obligated to adequately warn the physicians, who decide which drug to use and which warnings to provide. The drug companies are not required to warn hospital personnel because they do not select the proper drugs for the patient and prescribe them. Although the holding of *Greenberg* is not directly applicable here, we believe its rationale is:

> "In cases involving goods and other tangible physical materials which are in some way bad, imposition of liability unquestionably enhances the public interest in human life and health. However, in cases which deal with the conduct of individuals or institutions which themselves are pledged to protect human life and health, precautions must be taken to avoid an ultimate diminution of protection. * * * For the reasons stated we conclude that public policy dictates against the imposition of strict liability in tort for injuries resulting from the administration of X-radiation treatments by a hospital." *Greenberg v. Michael Reese Hospital* (1980), 83 Ill. 2d 282, 290-91.

We believe the trial court properly dismissed this strict liability count against the hospital.

As for the negligence count against the hospital, the plaintiff's complaint alleges that Michael Reese had a duty, in prescribing the two drugs, to adequately warn McCarthy of adverse effects the drugs may have on his ability to safely operate an automobile. The hospital contends that it had no duty to warn McCarthy of the adverse effects of the drug because such a warning is a medical question within the discretion of the treating physician, who, the hospital says, bears this responsibility. The hospital also argues that its duties should not be extended to unknown, nonpatient, third parties.

Kirk makes no allegations that Drs. Fine or Tracer, the defendant physicians, were agents or employees of Michael Reese, which would postulate liability on a *respondeat superior* basis. Absent a principal-agent relationship, the alleged misconduct of a physician may not be imputed to the hospital, unless it had reason to know that malpractice would occur. (*Pickle v. Curns* (1982), 106 Ill. App. 3d 734, 738-39.) Nor does the complaint allege that the hospital, through one of its agents or employees, was negligent in administering the drugs prescribed to McCarthy by, for example, providing the wrong quantity or type of drug. (*Ohligschlager v. Proctor Community Hospital* (1973), 55 Ill. 2d 411, 420.) The extent of warnings to patients concerning prescription drugs, as we have previously noted, is within the discretion of the physician. As such, the alleged negligent acts specified in the complaint are matters within the duty of care owed by the treating physician, rather than the hospital.

Recognizing the physician's duty, the plaintiff also argues that the hospital has an independent duty to warn, which is "based on ordinary principles of professional malpractice," and that that duty is extended to third parties. With this contention, then, the plaintiff is arguing that

a third party with no patient/hospital or patient/physician relationship be allowed to bring a cause of action based on the alleged negligent treatment of another.

A complaint for negligence, to be legally sufficient, must set out facts that establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. (*Teter v. Clemens* (1986), 112 Ill. 2d 252, 256; *Curtis v. County of Cook* (1983), 98 Ill. 2d 158, 162.) The determination of whether a duty exists–whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff–is an issue of law to be determined by the court. *Wimmer v. Koenigseder* (1985), 108 Ill. 2d 435, 440; *Pelham v. Griesheimer* (1982), 92 Ill. 2d 13, 18-19; *Cunis v. Brennan* (1974), 56 Ill. 2d 372.

This court has held that "the existence of a legal duty is not to be bottomed on the factor of foreseeability alone," but on whether the harm reasonably was foreseeable. (*Cunis v. Brennan* (1974), 56 Ill. 2d 372, 375 (the defendant municipality owed no duty to the plaintiff, who was injured when he was thrown 30 feet upon the collision with a third person's automobile and impaled his leg on a drain pipe left in the defendant's public parkway); see also *Feldscher v. E&B, Inc.* (1983), 95 Ill. 2d 360, 368-69; *Palsgraf v. Long Island R.R. Co.* (1928), 248 N.Y. 339, 342-43, 162 N.E. 99, 100; 3 F. Harper, F. James & O. Gray, The Law of Torts sec. 18.2, at 664 (2d ed. 1986).) This standard of reasonable foreseeability governs the foreseeability of injury from the defendant's conduct to the plaintiff, who would be the passenger here in the patient's car.

Although the reasonable foreseeability of injury is a key concern in determining whether a duty exists, it is not the only consideration. The question of duty in a negligence action should take into account the likelihood of

injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant. (*Lance v. Senior* (1967), 36 Ill. 2d 516, 518; *Boyd v. Racine Currency Exchange, Inc.* (1973), 56 Ill. 2d 95, 99; see also *Scott & Fetzer Co. v. Montgomery Ward & Co.* (1986), 112 Ill. 2d 378, 388-89; *Resag v. Washington National Insurance Co.* (1980), 90 Ill. App. 3d 971, 974; *Van Skike v. Zussman* (1974), 22 Ill. App. 3d 1039, 1042.) As we said in our discussion of the strict liability counts, and based on the Plaintiff's claimed defects in the warnings, this injury may not be considered reasonably foreseeable. This is particularly true where there is no allegation that the hospital's employees neither knew nor had reason to know that the warnings were not given by the prescribing physician. The burden of guarding against the type of injury that occurred to this plaintiff would be very cumbersome for the hospital employees, who do not receive the prescription drug warnings from the pharmaceutical companies, as do the physicians. In analogous circumstances, negligence claims against pharmacists for failure to warn concerning overconsumption of drugs have been dismissed primarily because the manufacturers' warnings about prescription drugs are to be given to the physicians, who then had the duty to warn the patients. See *Eldridge v. Eli Lilly & Co.* (1985), 138 Ill. App. 3d 124; *Jones v. Irvin* (S.D. Ill. 1985), 602 F. Supp. 399.

Holding the hospital liable for all harmful acts committed by patients who have been released would be an unreasonable burden on the institution. Too, a court's determination of duty reflects the policy and social requirements of the time and community. (*Mieher v. Brown* (1973), 54 Ill. 2d 539, 544-45; Green, *Foreseeability In Negligence Law*, 61 Colum. L. Rev. 1401, 1423 (1961); Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (1953).) It has been recognized that " 'duty' is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is

entitled to protection." (W. Prosser & W. Keeton, The Law of Torts sec. 53, at 358 (5th ed. 1984).) Our State's public policy concerning malpractice actions and health care professionals was recently discussed in *Bernier v. Burris* (1986), 113 Ill. 2d 219. This court observed that the legislature's goal in enacting a comprehensive medical malpractice law, in which one provision prohibited punitive damages in actions for "healing art malpractice" or medical malpractice, was to reduce damages generally against the medical profession. (113 Ill. 2d 219, 246.) In upholding the provision that limited attorney fees in successful medical malpractice actions, we observed that "[t]he goals of the legislation * * * were to reduce the burden existing in the health professions as a result of the perceived [medical] malpractice crisis." (113 Ill. 2d 219, 252; see also *Mega v. Holy Cross Hospital* (1986), 111 Ill. 2d 416, 428.) We believe that public policy and social requirements do not require that a duty be placed upon the hospital to warn the patient of the dangers of using the drug, prescribed by his physician, that would be extended to third-party nonpatients who have no patient hospital relationship or a special relationship with a patient.

In determining that a duty existed, the appellate court relied partially on *Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, a decision that the hospital contends does not support the expanded duty of care imposed by the appellate court. *Renslow*, it would appear, is the only medical malpractice action in which this court recognized that a nonpatient third party with no patient-hospital or patient-doctor relationship was allowed to maintain a cause of action against a hospital and doctor. In *Renslow*, a child not conceived at the time negligent acts were committed against its mother by a doctor and hospital employees was allowed to sue for that negligence directed against its mother. A wrong against one person may invade the protected rights of one who has a special relationship with the first party, as the law recognizes a limited area of transferred negligence.

(*Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, 257; see also *Hofmann v. Blackmon* (Fla. App. 1970), 241 So. 2d 752.) The transfer of duty is limited by a court's policy decision that the duty to act with reasonable care should be transferred to the third-party plaintiff. This duty, however, arises from a *special relationship* between either the defendant and the other party or the third-party plaintiff and the other party. The duty in *Renslow* was based primarily on the injury's being a direct result of alleged negligence to the infant's mother, which was found to have invaded the protected rights of the child, who was intimately related to the mother. Obviously, that type of relationship does not exist between McCarthy, the patient who allegedly received negligent care, and Kirk, the passenger in his car.

As we stated in *Teter v. Clemens* (1986), 112 Ill. 2d 252, 258, "[t]he basis for liability in a negligence action is not the mere fact of injury but that an injury has been caused by fault." The negligence count against the hospital failed to state a cause of action because it lacks the first essential element in a negligence claim: a recognized duty of care owed by the defendant to the particular plaintiff. The trial court properly dismissed this count.

Much of our discussion of the negligence count against the hospital is applicable to the counts against the two doctors. The plaintiff says the treating physicians had a duty to warn their patient, McCarthy, that the drugs could diminish his physical and mental abilities and that duty runs in favor of those in the reasonably foreseeable field of danger, which included Kirk. The plaintiff also contends that it was reasonably foreseeable that a patient who is given a drug that diminishes his driving abilities will later have a car accident. Thus, the plaintiff argues, the circumstances of this case give rise to a common law duty to warn, running from the doctors to those in the general public who may reasonably be expected to come in con-

tact with the patient on the day he is released. Dr. Tracer acknowledges that he had a duty to warn his patient about adverse effects that may result from taking a prescription drug. He argues, however, that physicians do not owe a general duty to unknown nonpatients who are injured by the physician's alleged negligent treatment of a patient. Dr. Tracer also asserts that the public policy of this State prohibits such a broad duty being imposed against treating physicians. Both doctors also say that the events alleged in the plaintiff's third amended complaint that resulted in Kirk's injury were not reasonably foreseeable. The third amended complaint specifically alleges that Dr. Tracer rendered medical treatment to McCarthy in the capacity of agent/servant or employee of Dr. Fine and is thus based on a *respondeat superior* theory. Dr. Fine argues that the trial court properly dismissed the plaintiff's claim based on *respondeat superior* for failure to state a cause of action and also because the complaint alleges a superseding, intervening cause of plaintiff's injuries, McCarthy's alleged negligent driving.

With the exception of *Renslow*, discussed previously with reference to the hospital, the plaintiff has not cited any holding in which this court has extended a physician's duty of care beyond the patient. In *Renslow*, this court recognized that the defendant doctor's duty to the mother could be transferred to her child based on the "intimate relationship" between the two. (67 Ill. 2d 348, 357.) There is no patient-doctor relationship here between the two defendant doctors and Kirk, nor is there a special relationship present as in *Renslow* between the patient and the plaintiff.

Many of the decisions upon which the plaintiff relies (*Semler v. Psychiatric Institute* (4th Cir. 1976), 538 F.2d 121; *Lipari v. Sears, Roebuck & Co.* (D. Neb. 1980), 497 F. Supp. 185; *Grimm v. Arizona Board of Pardons & Paroles* (1977), 115 Ariz. 260, 564 P.2d 1227; *Missouri, Kansas &*

Texas Ry. Co. v. Wood (1902), 95 Tex. 223, 66 S.W. 449; *Williams v. United States* (D.S.D 1978), 450 F. Supp. 1040; *Leverett v. State* (1978), 61 Ohio App. 2d 35, 399 N.E.2d 106; *McIntosh v. Milano* (1979), 168 N.J. Super. 466, 403 A.2d 500) have imposed a duty on doctors and medical or penal institutions with *physical custody* of dangerous individuals to protect third parties by taking reasonable measures to control their charge's conduct. These decisions represent an exception to the general proposition that there is no duty to control conduct of a third person to prevent him from causing harm to another absent a special relationship between either the dangerous person or potential victim. (Restatement (Second) of Torts sec. 315 (1965); *Welke v. Kuzilla* (1985), 144 Mich. App. 245, 375 N.W.2d 403; *Davis v. Mangelsdorf* (Ariz. App. 1983), 138 Ariz. 207, 673 P.2d 951.) There are types of relationships that give rise to a duty to control a third party's conduct set out in sections 316 to 319 of the Restatement (Second) of Torts (1965), but none are applicable here. These decisions upon which the plaintiff relies are primarily concerned with a custodian's duty and frequently rely on section 319 of the Restatement (Second) of Torts (1965), concerning the "duty of those in charge of person having dangerous propensities." There is no allegation here that the plaintiff was negligently released from the hospital, and there is no allegation that McCarthy had dangerous propensities of which the hospital and physicians were aware.

It is true, as the plaintiff points out, that several jurisdictions (*Welke v. Kuzilla* (1985), 144 Mich. App. (245, 375 N.W.2d 403; *Davis v. Mangelsdorf* (Ariz. App.) 1983), 138 Ariz. 207, 673 P.2d 951; *Gooden v. Tips* (Tex. App. 1983), 651 S.W.2d 364; *Wharton Transport Corp. v. Bridges.* (Tenn. 1980), 606 S.W.2d 521; *Watkins v. United States* (5th Cir. 1979), 589 F.2d 214; *Freese v. Lemmon* (Iowa 1973), 210 N.W.2d 576; *Kaiser v. Suburban Transportation System* (1965), 65 Wash. 2d 461, 398 P.2d 14, *modified* (1965), 401 P.2d 350) have held that a physician's relationship with the

patient was sufficient to impose a duty to protect unidentifiable, unknown third parties who are endangered by a patient. Other jurisdictions have limited the scope of the physician's duty to warn situations in which there is, apart from the patient, a specifically identifiable potential victim, rather than holding that a duty exists to the public generally. (See, e.g., *Furr v. Spring Grove State Hospital* (1983), 53 Md. App. 474, 454 A.2d 414; *Cairl v. State* (Minn. 1982), 323 N.W.2d 20; *Anthony v. United States* (S.D. Iowa 1985), 616 F. Supp. 156.) We consider that the preferable view, and the one consistent with this court's holdings and with legislation based on social and public policy, is that a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff (or a special relationship, as present) in *Renslow*, between the patient and the plaintiff. See also *Pelham v. Griesheimer* (1982), 92 Ill. 2d 13, 21 (a third-party nonclient who brings a negligence action against an attorney must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party).

Dr. Tracer points out that the most effective way to fulfill the duty required by the appellate court's decision is through continued confinement of the patient, which he says would thwart drug therapy that enables psychiatric patients to return to the community to lead normal, productive lives. The plaintiff contends, however, that Dr. Tracer has falsely portrayed the burden of the physician's duty under the appellate court's decision. All that is necessary for a physician to extinguish is potential liability, in the plaintiff's view, is for the physician to tell the patient that the drug will diminish his physical and mental abilities, that he should not drive for a designated time period, and that he should not consume alcohol. The plaintiff overlooks that the appellate court decision explicity extends the duties of the doctors—and, for that matter, all the defendants—beyond the patient to the general public.

Such a broad duty extended to the general public would expand the physician's duty of care to an indeterminate class of potential plaintiffs. Our General Assembly, as we discussed previously, has very recently enacted major medical malpractice legislation to reduce the burden of litigation against health care professionals. We must conclude that the plaintiff here does not fall into the class of persons to whom the duty of care is owed by the defendant doctors. (See *Curtis v. County of Cook* (1983), 98 Ill. 2d 158.) The trial court properly dismissed the action against Dr. Tracer because no special relationship existed between the doctor and the plaintiff, or between the patient and the plaintiff, as in *Renslow*. The trial court had granted Dr. Fine's motion for judgment on the pleadings, based on the ground that a wholly derivative action could not stand against a principal where there is no cause of action against the agent. When suit is brought against a master based on the alleged negligent acts of his servant, and no independent negligent acts are alleged against the master, the master's liability is entirely derivative (*Towns v. Yellow Cab Co.* (1978), 73 Ill. 2d 113.) Where the agent is not guilty, it necessarily follows that the party for whom he acted, the master, cannot be guilty. Because the action against Dr. Fine is a derivative action, based on Dr. Tracer's treatment of McCarthy as Dr. Fine's agent, it was also properly dismissed.

Other contentions of the plaintiff need not be considered because the first essential of a negligence action– the existence of a recognized duty– has not been met.

For the reasons stated, the judgment of the appellate court is reversed as to all counts and the judgment of the trial court is affirmed.

Appellate court reversed;
circuit court affirmed.

CHIEF JUSTICE CLARK and JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

JUSTICE SIMON, concurring in part and dissenting in part:

While I concur with the majority's decision to dismiss the claim against the hospital, I dissent from the majority's conclusion that the plaintiff fails to state a cause of action against the doctors for negligence and against the pharmaceutical companies for failure to give adequate warnings of the drugs' dangerous propensities. The cause of action against the doctors presents neither the problems inherent in upholding the negligence count against the hospital nor the complex policy considerations involved in extending the boundaries of the tort of medical malpractice. (Slip op. at 13.) Rather, the doctors' liability here is grounded in basic concepts of negligence, the same primary elements of negligence which law students study during their first year: duty, breach of duty, and the foreseeable injury that subsequently results. See, *e.g.*, F. Harper, F. James & O. Gray, The Law of Torts sec. 18.2 (2d ed. 1986).

The majority accurately states that: "The question of duty in a negligence action should take into account the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." (Slip op. at 10, citing *Lance v. Senior* (1967), 36 Ill. 2d 516, 518; *Boyd v. Racine Currency Exchange, Inc.* (1973), 56 Ill. 2d 95, 99.) The doctors here have already acknowledged that they breached their duty to warn their patient of the possible adverse side effects of the prescribed drugs. Had they adequately warned their patient of the risks which the pharmaceutical company discussed in their insert, the patient would have been aware that:

> "The use of this drug may impair the mental and physical abilities required for driving a car or operating heavy machinery. Physicians should be alert to the possibility that severe adverse reactions may occur which require immediate medical attention. Potentiation of the effects of alcohol may occur with the use of this drug."

The doctors' failure to issue this warning set into motion a series of events which culminated in an injury to a forseeable class of persons–a passenger in the car of a patient who took the drug, drank, and drove.

It is immaterial that the passenger rather than the patient was injured as a result of the doctors' failure to issue these warnings. A duty can exist to a third party when a defendant who has knowledge of the risk fails to take precautions, and a foreseeable injury of the same kind or class of harm which made the conduct dangerous occurs. *Neering v. Illinois Central Railroad Co.* (1943), 383 Ill. 366, 379.

For instance, it is negligent for an adult to give a loaded shotgun to a child because a child does not have the maturity to understand the potential danger of pulling the trigger. As far as the adult's liability is concerned, it makes little difference whether the child shoots himself or someone else whom the adult has no reason to know. The adult's duty to refrain from this negligent act extends to all "kinds of hazards that were so foreseeably great as to make the act negligent." F. Harper, F. James & O. Gray, The Law of Torts sec. 18.2, at 662 (2d ed. 1986).

As in the above example, the doctors here are responsible for the natural consequences that flow from their failure to issue proper warnings to their patient. These consequences would include the plaintiff's injury since it fell within the foreseeable risks specifically mentioned in the warnings provided by the pharmaceutical company. The majority's view that the plaintiff here was too remote to fall within the scope the doctors' duty of care (slip op. at

14) is overly narrow under any modern theory of negligence. The doctors were aware of the dangers of drinking while taking the prescribed medication. They were also aware that the drugs could impair the patient's ability to drive. Because it was foreseeable that if the patient were unaware of the side effects of the drugs he might have a drink and drive, it was also foreseeable (that such conduct could harm a passenger in his car. Since the plaintiff's harm was a foreseeable) consequence of the doctors' failure to guard against this risk, the plaintiff's injury fell within the scope of the doctors' duty of due care.

The majority's fear that if we were to uphold this cause of action we would extend a doctor's duty of care to an indeterminable number of persons is misplaced. (Slip op. at 14.) As stated above, the doctors' potential liability extends only to the class of persons whose injury is so foreseeably great as to make the doctors' conduct negligent. The majority's comparision of the facts presented here to the situation in the famous case of *Palsgraf v. Long Island, R.R. Co.* (1928), 248 N.Y. 339, 162 N.E. 99, is therefore, inappropriate. The injury there was far more remote from the negligent conduct than the injury here. In *Palsgraf* the plaintiff sued a railroad company for injuries sustained when she was hit by several scales which fell off the station wall. The scales fell due to an explosion which occurred when a railroad guard pushed a passenger, who was carrying a box of fire crackers, aboard a crowded train. The force of the explosion knocked the scales off the wall, hitting the plaintiff. Justice Cardozo, writing for the New York Court of Appeals, concluded that the railroad company was not liable for the accident. He reasoned that:

> "The conduct of the defendant's guard, *** was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed ***. If no hazard was

> apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong *** with reference to some one else [the passenger carrying the package of fire crackers] ***." F. Harper, F. James & O. Gray, The Law of Torts sec. 18.2, at 655 (2d ed. 1986), quoting *Palsgraf v. Long Island R.R. Co.* (1928), 248 N.Y. 399, 341-44, 162 N.E. 99, 99-100.

In contrast, the risk to the plaintiff here was readily apparent—it was foreseeable that (the patient could injure himself) while driving should he fail to receive the appropriate warnings. It was as forseeable that while driving he might have a passenger who also would be injured because of the combination of the medicine and alcohol. Too, there was nothing seemingly innocent or harmless in the doctors' failure to issue the warning. The doctors' wrongs here were twofold; they not only failed to exercise due care to their patient by neglecting to issue the warnings, but also they disregarded the risk to the plaintiff or any other person unfortunate enough to be traveling with the patient or in his path. As one group of commentators have noted, the rule of *Palsgraf* is that:

> "[T]he scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e., negligent). Both seek to find what consequences of the challenged conduct should have been foreseen by the actor who engaged in it. Neither inquiry stops with what might be called the physical range of foreseeable harm, or with mere proximity in time or space. In both we look to see what natural forces and what human conduct should have appeared likely to come on the scene, and we weigh the dangerous consequences likely to flow from the challenged conduct in the light of these interventions." F. Harper, F. James & O. Gray, The Law of Torts sec. 18.2, at 656-57 (2d ed. 1986).

The plaintiff's cause of action in this case fits squarely

within this rule. The injury was a natural consequence of the doctors' failure to issue the warnings and, unlike the situation in *Palsgraf*, no extra burden is imposed on a doctor to take precautions or give adequate warnings because the plaintiff's passenger rather than the plaintiff might be injured. In contrast to the situation in *Palsgraf*, where to avoid liability a guard would have had to open every single package before helping a person onto a train, all a doctor would be required to do is what the law already expects–to exercise due care with respect to his patient by informing him of the side effects of the prescribed drugs.

The majority's decision to dismiss the strict liability claim for failure to provide adequate warnings is also questionable. The court's ruling effectively holds that the learned intermediary doctrine, which absolves a pharmaceutical manufacturer of liability for harmful side effects of the prescribed drug once health-care professional are given adequate warnings, operates as an absolute defense to strict liability. My colleagues reach this conclusion without any consideration of the nature, adequacy or existence of the warnings the pharmaceutical company gave with respect to the medicine prescribed here.

The broad reach of this holding results from the majority's error in viewing this question as though it came before this court on a ruling on a motion for summary judgment, rather than a motion to (dismiss. Instead of examining the legal sufficiency of the complaint, the appropriate standard for reviewing a) dismissal resulting from failure to state a cause of action (*Katz v. Belmont National Bank* (1986), 112 Ill. 2d 64, 67), the majority, (in effect, accepts as true the pharmaceutical companies' allegation that the warnings they provided were adequate. The majority states that the pharmaceutical companies would not:

> "have reasonably foreseen that their drugs would be dispensed without warnings by the physicians***. This sequence would be triggered by an element that we have determined that the

> pharmaceutical companies did not have to foresee under the circumstance shown here: that the drugs would be dispensed *without the warnings that the two companies provided to the physicians.*" (Emphasis added.) Slip op. at 6-7.

The majority, in assuming the warnings were adequate, deprives the plaintiff of his right to present evidence to a finder of fact relative to the existence and sufficiency of the warnings. Our appellate court, in reversing the trial court's dismissal of this claim, accurately emphasized that:

> "[T]he sufficiency of the warnings is not resolved judicially *** but remains a question to be resolved by the trier of facts ***. *** Here, since the counts against the drug manufacturers were dismissed because of a failure to state a cause of action [citation], the *factual question as to the adequacy of warnings that allegedly were included as package inserts or that may have been given by the drug manufacturers to the medical profession is not before us.* (Emphasis added.) 136 Ill. App. 3d 945, 952 n.2.

By denying the plaintiff his right to present this proof, the majority has turned the learned intermediary doctrine into an absolute bar against liability. This determination effectively insulates drug manufacturers from their obligation to provide adequate warnings. Although the warnings given may have been adequate, we have no way at this point in the litigation of knowing whether this is so, and my view is that their adequacy needs to be tried out.)

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

March 18, 1986

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

Ms. Ann W. Regan
Wildman, Harrold, Allen,
and Dixon
Attorneys at Law
One IBM Plaza, S#3000
Chicago, IL 60611

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 62700 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, et al., etc. (Henry K. Fine, M.D., petitioner).

No. 62701 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, et al., etc. (Irving *H. Tracer, M.D., petitioner).*

No. 62702 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, petitioner.

No. 62703 - James D. Kirk, respondent, v. Michael Reese Hospital an Medical Center, et al., etc. (E. R. Squibb & Sons, petitioner).

No. 62704 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, et al., etc.

(SmithKline Clinical Laboratories, Inc., petitioner).

The motions by petitioners for leave to file motions for reconsideration of the orders denying the petitions for leave to appeal are *allowed.*

The motions for reconsideration are *allowed.*

The petitions for leave to appeal are *allowed,* and these cases are consolidated.

JH: sdl
cc: All Attorneys of Record

FEB 26 1986

Nos. 62700, 62701,
62702, 62703, 62704

IN THE
SUPREME COURT OF ILLINOIS

JAMES D. KIRK,
Plaintiff-Respondent,

vs.

MICHAEL REESE HOSPITAL and MEDICAL CENTER; IRVING H. TRACER, M.D.; E.R. SQUIBB & SONS, INC.; and SMITHKLINE CLINICAL LABORATORIES, INC.,
Defendants-Petitioners,

and

DANIEL MCCARTHY,
Defendant.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District,

No. 81-2408

There heard on Appeal from the Circuit Court of Cook County, County Dept., Law Division

Honorable Myron T. Gomberg, Judge Presiding

NOTICE OF MOTION

TO: Mitchell W. Horwitz
Horwitz, Horwitz & Associates, Ltd.
180 North LaSalle Street, Suite 2201
Chicago, IL 60601

PLEASE TAKE NOTICE that on February 24, 1986 the undersigned filed the attached Motion For leave to File Motion For Reconsideration and Motion for Reconsideration, copies of which are hereby served upon you, by mailing copies thereof to the Clerk of the Illinois Supreme Court, Springfield, Illinois and by mailing copies thereof to each Justice of the Illinois Supreme Court at the addresses listed below:

Honorable William G. Clark, Chief Justice of the Illinois Supreme Court, 30th Floor, Richard J. Daley Center,

Chicago, Illinois 60602
Honorable Daniel P. Ward, Justice of the Illinois Supreme Court, 30th Floor, Richard J. Daley Center, Chicago, Illinois 60602
Honorable Joseph H. Goldenhersh, Justice of the Illinois Supreme Court, 6464 W. Main Street, Suite 3A, Belleville, Illinois 62223
Honorable Howard C. Ryan, Justice of the Illinois Supreme Court, 111 E. Jefferson Street, Ottawa, Illinois 61350
Honorable Thomas J. Moran, Justice of the Illinois Supreme Court,
Honorable Seymour Simon, Justice of the Illinois Supreme Court, 30th Floor, Richard J. Daley Center, Chicago, Illinois 60602
Honorable Ben C. Miller, Justice of the Illinois Supreme Court, 509 S. 6th Street, Suite 435, Springfield, Illinois 62701

BURDITT, BOWLES & RADZIUS, LTD.

By: /s/ ROBERT G. EPSTEEN
Robert G. Epsteen
Attorneys for E.R. Squibb & Sons, Inc.

Robert G. Epsteen
Burditt, Bowles & Radzius, Ltd.
33 West Wacker Drive, Suite 1900
Chicago, IL 60606-1218
(312) 781-6633

PROOF OF SERVICE

STATE OF ILLINOIS
COUNTY OF COOK
} SS.

I, Marilou Sullivan, a non-attorney, on oath state that I served the above and foregoing Notice of Motion, Motion for Leave to File Motion for Reconsideration and Motion for Reconsideration to the attorney and judges named on the attached service list and by depositing same in the U.S. mail chute located at 333 West Wacker Drive, Chicago, Illinois 60606 before the hour of 5:00 p.m. on this 24th day of February, 1986.

/s/ MARILOU SULLIVAN

SUBSCRIBED AND SWORN to
before me this 24th day
of February, 1986.

/s/ NANCY MULLANY
Notary Public

BURDITT, BOWLES & RADZIUS, LTD.

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TELEX: 350188
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MAR 06 1986

March 3, 1986

VIA FEDERAL EXPRESS

The Honorable Thomas J. Moran
838 North Western Avenue
Lake Forest, IL 60045

Re: James D. Kirk v. Michael Reese Hospital et al.

Dear Justice Moran:

Enclosed is a copy of a motion for reconsideration and a motion for leave to file it in the above-referred to matter. Your copy was inadventently mailed to your former address in Waukegan and returned to us. My apologies for any inconvenience this may have caused you.

Respectfully yours,

/s/ ROBERT G. EPSTEEN
Robert G. Epsteen

RGE/mls
Encls.
cc: All Counsel of Record

SUPREME COURT OF ILLINOIS
WEDNESDAY, FEBRUARY 5, 1986

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

No. 62700 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, et al., etc. (Henry K. Fine, M.D., petitioner). Leave to appeal, Appellate Court, First District. (1-81-2408)

Petition for leave to appeal denied.

No. 62701 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, et al., etc. (Irving H. Tracer, M.D., petitioner). Leave to appeal, Appellate Court, First District. (1-81-2408)

Petition for leave to appeal denied.

No. 62702 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, petitioner. Leave to appeal, Appellate Court, First District. (1-81-2408)

Petition for leave to appeal denied.

No. 62703 - James D. Kirk, respondent, v. Michael Reese Hospital an Medical Center, et al., etc. (E. R. Squibb & Sons, petitioner). Leave to appeal, Appellate Court, First District. (1-81-2408)

Petition for leave to appeal denied.

No. 62704 - James D. Kirk, respondent, v. Michael Reese Hospital and Medical Center, et al., etc. (SmithKline Clinical Laboratories, Inc., petitioner). Leave to appeal, Appellate Court, First District. (1-81-2408)

Petition for leave to appeal denied.

THIRD DIVISION
August 28, 1985

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

81-2408

JAMES D. KIRK,
Plaintiff-Appellant,

vs.

MICHAEL REESE HOSPITAL and MEDICAL CENTER; IRVING H. TRACER, M.D.; E.R. SQUIBB & SONS, INC.; and SMITHKLINE CLINICAL LABORATORIES, INC.,
Defendants-Appellees,

and

DANIEL McCARTHY,
Defendant.

Appeal From The Circuit Court of Cook County.

Honorable Myron T. Gomberg, Judge Presiding.

JUSTICE RIZZI delivered the opinion of the court:

This is a personal injury action. Plaintiff, James D. Kirk, appeals from the dismissal of five counts of his third amended complaint for failure to state a cause of action. Count 1 involves a negligence action against defendant Michael Reese Hospital and Medical Center; count 2 involves a medical negligence action against defendants Irving H. Tracer, M.D., and Henry K. Fine, M.D., both of whom are psychiatrists; count 3 involves a separate medical negligence action against defendant Tracer; count 4 involves a product liability action against defendant Michael Reese Hospital and Medical Center and defendant E.R. Squibb & Sons, Inc.; and count 5 involves a prod-

uct liability action against defendant Michael Reese Hospital and Medical Center and defendant SmithKline Clinical Laboratories, Inc. In count 2, plaintiff alleges that Tracer acted as the agent of Fine. Count 6, which involves a negligence action against defendant Daniel McCarthy, is not involved in the appeal. We reverse the dismissals of the five counts and remand for further proceedings.

We assume the following facts to be true based upon a reading of the composite allegations in the five counts of the third amended complaint. On August 1, 1978, McCarthy was being treated as a patient at the hospital by the two doctors. The doctors ordered that McCarthy be given the prescription drug Prolixin Decanoate, manufactured (by Squibb & Sons, and the prescription drug Thorazine, manufactured by) SmithKline. Hospital personnel then injected McCarthy with Prolixin Decanoate and gave him Thorazine for oral consumption. On the same day, McCarthy was discharged from the hospital. He than consumed an alcoholic beverage and drove his automobile with plaintiff as a passenger. The drugs Prolixin Decanoate and Thorazine diminished McCarthy's mental and physical abilities, which caused McCarthy to lose control of the automobile. As a result, the automobile hit a tree. Plaintiff suffered severe and permanent injuries in the occurrence.

The gist of plaintiff's actions is that the drug manufacturers failed to provide adequate warnings of the adverse effects of their drugs, and that the doctors and the hospital failed to warn their patient prior to his discharge from the hospital that the drugs would impair the patient's mental and physical abilities, although defendants knew or should have known of the adverse effects of the drugs.

Defendants argue separately that they were properly dismissed because they owed no duty to plaintiff. As we view the case, whether the separate defendants owed a duty to plaintiff can be discussed as a single issue.

The existence or nonexistence of a legal duty is a ques-

tion of law to be determined by the court. This is so because the existence of a legal duty is not a palpable fact, but merely a legal conclusion that in certain generalized circumstances redress should be available to those who are injured as a proximate cause of either the acts or inactions of another. The broad factors to be considered in making this determination include (1) the foreseeability that the defendant's acts or inactions will result in injury to the plaintiff, (2) the magnitude of the burden of guarding against the injury and the consequences of placing that burden upon the defendant, and (3) the desirability in terms of public policy of imposing a duty on the defendant to guard against the risk that is involved. *See Renslow v. Mennonite Hospital* (1977), 67 Ill. 2d 348, 356, 367 N.E.2d 1250, 1254; *Cunis v. Brennan* (1974), 56 Ill. 2d 372, 374, 308 N.E.2d 617, 618; *Barnes v. Washington* (1973), 56 Ill. 2d 22, 26, 29, 305 N.E.2d 535, 538, 539; *Meiher v. Brown* (1973), 54 Ill. 2d 539, 541, 544-45, 301 N.E.2d 307, 309-10; *Orrico v. Beverly Bank* (1982), 109 Ill. App. 3d 102, 105-06, 440 N.E.2d 253, 256.

With regard to the question of whether it was foreseeable that defendants' failure to warn[1] would result in injury to plaintiff, we apply a standard of objective reasonableness. Under this standard, it is not essential that defendants should have foreseen the precise hazard or exact consequences which resulted from a failure to warn, nor is it essential that defendants should have foreseen the injuries to a specific person. A duty may exist to one who is unknown and remote in time and place. *See Renslow*, 67 Ill. 2d at 357, 367 N.E.2d at 1254-55; *Neering v. Illinois Central R.R. Co.* (1943), 383 Ill. 366, 380, 50 N.E.2d 497, 503; *Wintersteen v. National Cooperage & Woodenware Co.*

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[1] Since a duty to warn includes a duty to adequately warn *Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App. 3d 540, 562, 390 N.E.2d 1214, 1230), when we refer to a failure to warn in the text, we implicitly include a failure to adequately warn.

(1935), 361 Ill. 95, 103, 197 N.E. 578, 582; *Orrico*, 109 Ill. App. 3d at 107, 440 N.E.2d at 257. With these considerations in mind, we believe that the event that occurred was sufficiently foreseeable for the doctors, hospital and drug manufacturers to have known that their failure to adequately warn of the adverse effects of the drugs would result in injury to the plaintiff or other members of the general public.

Defendants argue that what occurred in this case was not reasonably foreseeable because McCarthy's consumption of an alcoholic beverage and his negligent driving constitute superseding intervening causes of the occurrence. A superseding intervening cause is a subsequent independent action which breaks the causal relationship between the original wrong and the injury, and it, rather than the original wrong, causes the injury. However, the intervention of an independent action will not break a causal connection if the intervention of the independent action was itself reasonably foreseeable. *Neering*, 383 Ill. at 380-81, 50 N.E.2d at 503-04; *Wintersteen*, 361 Ill. at 104, 197 N.E. at 583; *Orrico*, 109 Ill. App. 3d at 107, 440 N.E.2d at 257. In the present case, McCarthy's consumption of an alcoholic beverage, the manner of his driving and plaintiff's presence in the automobile were all within the realm of reasonable foreseeability absent a pertinent warning by the respective defendants. Thus, defendants' argument on this point is without merit.

We next address the magnitude of the burden of guarding against an injury to a member of the general public because of a failure to adequately warn of the adverse effects of prescription drugs and the consequences of placing that burden upon doctors, hospitals and prescription drug manufacturers. The doctors and the hospital argue that they should not owe a duty to an injured party who is merely a member of the general public and not their patient because the imposition of a duty to a non-patient

would unjustly render them liable to an indeterminate class. In this same regard, the drug manufacturers argue that a prescription drug manufacturer's duty to warn the medical profession does not cover third parties who do not use the drugs.[2] We do not find defendants' arguments persuasive.

Plainly, the fast pace at which new drugs are presently being introduced and utilized demands that the public be protected from their varying adverse effects. Thus, we believe that doctors and hospitals have a duty to warn their patients of the adverse effects of drugs and drug manufacturers have a duty to warn the medical profession of the adverse effects of their drugs, and that these duties

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[2] The adequacy of a prescription drug manufacturer's warnings is determined by taking into account all aspects of the warnings, including the content of the warnings and how and to whom the warnings are conveyed. As an example, a drug manufacturer may communicate product information to the medical profession in a number of ways: package inserts, the Physicians' Desk Reference, "Dear Doctor" letters and detailmen. Ultimately, the sufficiency of the warnings is not resolved judicially by pointing to a single document or act, but remains a question to be resolved by the trier of fact in light of all the information provided by the manufacturer and all the information that it was reasonably possible to provide. *See Mahr*, 72 Ill. App. 3d at 562, 390 N.E.2d at 1230. The trier of fact may consider warnings given by drug manufacturers to physicians to be adequate (*e.g., Lawson v. G.D. Searle & Co.* (1976), 64 Ill. 2d 543, 553, 356 N.E.2d 779, 784) or inadequate (*e.g. Mahr*, 72 Ill. App. 3d at 563-65, 390 N.E.2d at 1231-32). Also, with regard to oral contraceptives, the drug manufacturer may have a duty to warn the consumer. *Stephens v. G.D. Searle & Co.* (E.D. Mich. 1985), 602 F. Supp. 379; *MacDonald v. Ortho Pharmaceutical Corp.* (Mass. 1985), 475 N.E.2d 65. Here, since the counts against the drug manufacturers were dismissed because of a failure to state a cause of action (Ill. Rev. Stat. 1983, ch. 110, par. 2-615), the factual question as to the adequacy of warnings that allegedly were included as package inserts or that may have been given by the drug manufacturers to the medical profession is not before us.

implicitly extend to cover members of the public who may be injured as a proximate cause of a failure to adequately warn. Moreover, we believe that the imposition of such a duty in favor of the public is not a undue burden to place upon doctors, hospitals and drug manufacturers in light of the great risks that are involved to every member of the public. In a balancing test, the rights and burdens of the members of the public whose injuries are proximately caused by the failure of doctors, hospitals and drug manufacturers to adequately warn of the adverse effects of drugs substantially outweigh the added burden to doctors, hospitals and drug manufacturers to be fully responsible for their wrongdoing. Additionally, the imposition of a pertinent duty to warn that implicitly extends to cover the general public would not make doctors, hospitals or drug manufacturers any more liable to an indeterminate class than are those in other fields and professions when a member of the general public is injured as a proximate cause of their wrongful acts or inactions. Finally, nothing in the record demonstrates that there would be a *quid pro quo* for society in return for the absolution of doctors, hospitals or manufacturers from their responsibility to the public for their failure to warn of the adverse effects of drugs. We therefore see no reason to discriminate in favor of doctors, hospitals or drug manufacturers at the expense of innocent victims.

We next examine the public policy considerations which pertain in extending the duty to warn that is involved here to cover members of the general public. Defendants contend that such an extension of their duty to warn would discourage them from treating patients with medicines that would "help them the most" and that it would "thwart the recent advances in drug therapy." They also contend that it would open the door to limitless medical negligence suits by an infinite class of plaintiffs and that it would make them absolutely liable. These contentions miss the point.

The duty which is involved here simply requires a warning, not control or prevention. In this regard, we point out that the duty to warn would arise only if the doctors, hospitals or drug manufacturers know or should know of the adverse effects of a drug. The duty is plainly nonjudgmental. Moreover, we are speaking in this case only of a duty and not causation. Obviously, no defendant can be liable unless causation as well as breach of duty is proved. *See Borowski v. Von Solbric* (1975), 60 Ill. 2d 418, 423-24, 328 N.E.2d 301, 305; *Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App. 3d 540, 563, 390 N.E.2d 1214, 1230-31. Also, we are mindful that in personal injury and wrongful death cases involving medical negligence, expert witnesses in the same profession or field as the defendant are necessary to hold the defendant liable. Thus, the liability of defendants in medical negligence cases must be substantiated by their own peers. *See, e.g.*, Ill. Rev. Stat. 1985, ch. 110, pars. 2-622, 2-1013 - 1018 (eff. Aug. 15, 1985). These are telling points which militate against defendants' specific contentions.

Generally, the desirability in terms of public policy of imposing or extending any duty relating to doctors, hospitals and drug manufacturers must be determined by balancing dichotomous public concerns. The problem is to balance the just claims of people who are injured as a proximate cause of medical negligence and related causes "against the public's claim not to be victimized by needlessly swollen medical costs." Editorial, *Compromise on malpractice*, Chicago Tribune, June 8, 1985, § 1, at 10. For the reasons that we have already discussed, we do not believe that extending the duty that is involved here to cover members of the general public will needlessly swell medical costs. Rather, we believe that the public interest requires that members of the general public be entitled to full redress if they are injured as a proximate cause of the failure of doctors, hospitals or drug manufacturers to adequately warn of the adverse effects of drugs. Plainly, under

a public policy analysis, concern for righteousness must be focused on the members of the public who are injured and suffer because of the medical negligence and related causes, rather than on the doctors, hospitals and drug manufacturers who commit the medical negligence and related wrongful acts that cause the injuries and suffering. The victims, not the wrongdoers, need protection. The wrongful acts must be curtailed, not the rights of the victims of the wrongful acts.

The hospital makes the additional argument that it cannot be liable for negligence here because the administration of drugs involves the decision to treat a patient in a particular manner, which is a medical question entirely within the discretion of the treating doctor, and the doctors were "neither employed nor controlled by the hospital." This argument is misapplied because the negligence count against the hospital involves the hospital's own negligence for failure to warn, rather than a claim that the medical treatment itself was improper.

Moreover, the old conception that a hospital does not undertake to treat the patient no longer reflects reality. Plainly, hospitals do far more than merely furnish an edifice for treatment. Rather, they regularly employ on a salaried basis a staff of physicians, nurses, pharmacists, technicians, and medical administrative professionals, and, not insignificantly, the costs for these personnel are factored into the amount that patients are charged by the hospital. *See Darling v. Charleston Community Memorial Hospital* (1965), 33 Ill. 2d 326, 332, 211 N.E.2d 253, 257. Also, hospitals now advertise and promote the treatment and care that patients receive at their particular hospital (*see, e.g.*, Chicago Sun-Times, June 30, 1985, Medical Centers - Special Pullout Section), and it is not uncommon for members of the general public to choose a particular hospital for treatment and care simply on the basis of the reputation of the hospital itself. It follows that hospitals must

assume certain responsibilities for the care and treatment of their patients. *See Darling*, 33 Ill. 2d at 332, 211 N.E.2d at 257. Within this context, we conclude that before a patient is discharged from a hospital, the hospital has a duty to warn the patient of the adverse effects of drugs that were administered by the hospital if the hospital knows or should know that the drugs will impair the patient's mental or physical abilities, or will be potentially dangerous in combination with particular foods, beverages or other drugs.[3] A patient should not be discharged from a hospital under circumstances which make the patient unknowingly a potential danger to himself or herself, and the public at large, because of drugs administered by hospital personnel. Here, we should bear in mind that the patient is charged by the hospital for both the services of the hospital personnel who administered the drugs as well as for the drugs themselves[4] and that the duty arises only when the hospital knows or should know of the adverse effects of the drugs.

We therefore conclude that each of the defendants owed a legal duty to the plaintiff as stated in this opinion.[5] Whether defendants breached their respective duties is to be determined by the trier of fact.

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[3]The hospital is not absolved from responsibility merely because the attending physician has the same responsibility. To illustrate, in *Darling*, the court stated: "At that point it became the nurses' duty to inform the attending physician, and if he failed to act, to advise the hospital authorities so that appropriate action might be taken." 33 Ill. 2d at 333, 211 N.E.2d at 258.

[4]We presume that these costs are either factored into the patient's hospital bill or that they appear expressly on the bill itself.

[5]The duty of each defendant to warn is nondelegable. To illustrate, the negligent failure of the doctors to learn of the risks of the drugs from sources other than the drug manufacturers would

(Footnote continued on the following page)

Next, the hospital makes the argument that it cannot be liable under the doctrine of strict liability for failure to warn of the adverse effects of drugs that it administers because it simply provides a service in that regard. The hospital's argument would have merit if this case involved injurious results of treatment (*see Greenberg v. Michael Reese Hospital* (1980), 83 Ill. 2d 282, 289, 415 N.E.2d 390, 393) or danger created by the medical decision to administer the drugs (*see Dubin v. Michael Reese Hospital & Medical Center* (1980), 83 Ill. 2d 277, 281, 415 N.E.2d 350, 352), rather than the unreasonably dangerous condition of the drugs themselves if no warning of the adverse effects is given to the patient. Compare *Cunningham v. MacNeal Memorial Hospital* (1970), 47 Ill. 2d 443, 447-53, 266 N.E.2d 897, 899-902. Here, all of the elements for a product liability action have been sufficiently alleged: the case involves a product, *i.e.*, drugs; the hospital was within the distribution chain of the product;[6] the product was unreasonably dangerous without adequate warning of its adverse effects; the hospital knew or should have known of the unreasonably dangerous condition; the unreasonably dangerous condition existed at the time the product left the hospital's control; and the unreasonably dangerous condition of the product, *i.e.*, the failure to warn, was a proximate cause of plaintiff's injuries. Thus, this is a classic product liability case if the alleged facts are proved. *See Woodill v. Parke Davis & Co.* (1980), 79 Ill. 2d 26, 402 N.E.2d 194; *Cunningham*, 47 Ill. 2d 443, 266 N.E.2d 897; *Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App. 3d 540,

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5 *(Continued)*

not relieve the drug manufacturers of liability for harm resulting from their own failure to adequately warn. *See Mahr*, 72 Ill. App. 3d at 566, 390 N.E.2d at 1233. *See also* n.3, *supra*.

[6] On this point, we note that hospitals charge patients for the drugs that they dispense. Thus, a sale is involved, and the hospital is clearly within the distribution chain of the product. *Cunningham*, 47 Ill. 2d 443, 447-53, 266 N.E.2d 897, 899-902.

559-60, 390 N.E.2d 1214, 1228-29. We see no good reason for engrafting an exception in favor of hospitals onto the strict tort liability theory, which in effect, is what the hospital would have us do. *Cunningham*, 47 Ill. 2d at 452, 266 N.E.2d at 902. The hospital's argument has no merit.

Finally, we address the hospital's argument that the product liability count against it must be dismissed pursuant to Ill. Rev. Stat. 1983, ch. 110, par. 2-621. The statute provides for the dismissal of defendants other than manufacturers in product liability actions under certain circumstances. However, the statute applies only to causes of action accruing on or after September 24, 1979. (In the present case, plaintiff was injured on August 1, 1978.) Thus, the hospital's argument is baseless.

Accordingly, we hold that each defendant owed a duty to warn as stated in this opinion and that the duty implicitly extended to cover plaintiff and other members of the general public. Therefore, the counts against the respective defendants in the third amended complaint sufficiently state a cause of action. The dismissals are reversed, and the case is remanded for further proceedings.

REVERSED and REMANDED.

WHITE, P.J., concurs.

McNAMARA, J., dissents.

McNAMARA, J., dissents.

I respectfully dissent with the majority's conclusion that defendants owe a duty to a plaintiff who was not a patient, did not use the prescribed drug, and whose injury was not reasonably foreseeable. The majority's extension of tort duty to such a remote party will unduly burden the health care industry and its professionals and is, therefore, contrary to public policy. Thus, I would affirm the trial court's dismissal of the counts against the physicians, hospital and drug manufacturers.

Illinois courts have not allowed a non-patient, non-user of a drug to assert a negligence or strict product liability action for failure to warn the patient or consumer of the drug about adverse effects. The tort rationale for imposing liability on a particular defendant is based on a duty analysis. (*Martin v. Kiendl Const. Co.* (1982), 108 Ill. App.3d 468, 438 N.E.2d 1187.) The concept of duty is:

> " '*** a question of whether the defendant is under any obligation for the benefit of the particular plaintiff ***.' This question, i.e., whether the defendant and the plaintiff stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the plaintiff's benefit, is one of law for determination by the court."

(*Cunis v. Brennan* (1974), 56 Ill.2d 372, 308 N.E.2d 617, quoting Prosser, Torts §53, at 324 (4th ed. 1971).) Generally, the creation of a legal duty requires that the occurrence involved must have been reasonably foreseeable; it requires more than a mere possibility of occurrence. (*Cunis v. Brennan.*) Courts have denied liability for negligence to an unforeseeable plaintiff (*Palsgraf v. Long Island R.R. Co.* (1928), 248 N.Y. 339, 162 N.E. 99), or an unforeseeable occurrence (*Mieher v. Brown* (1973), 54 Ill.2d 539, 301 N.E.2d 307), and have not allowed a strict product liability by an unforeseeable plaintiff for an unforeseeable occur-

rence (*Winnett v. Winnett* (1974), 57 Ill.2d 7, 310 N.E.2d 1.) Although questions of foreseeability are ordinarily for the jury to decide, where the facts alleged in a complaint on their face demonstrate that the plaintiff would never be entitled to recover, the complaint is properly dismissed. *Winnett v. Winnett.*

The negligence counts in the present complaint allege that Daniel McCarthy's physicians, Drs. Tracer and Fine, and Michael Reese Hospital and Medical Center prescribed certain drugs to McCarthy without adequate warning which directly resulted in plaintiff's injury. In order for a duty to be imposed, the doctors and hospital should have reasonably foreseen that McCarthy would: a) be discharged from the hospital that day; b) consume an alcoholic beverage; c) operate a motor vehicle; d) pick up plaintiff as a passenger; e) drive in a careless manner or with his mental capabilities and physical reactions diminished; and f) collide with a tree. It seems clear that the events leading to plaintiff's injury are indirect and unconnected to the alleged negligence of the doctors and hospital. See *Van Skike v. Zussman* (1974), 22 Ill. App.3d 1039, 318 N.E.2d 244.

Although our supreme court has recognized a tort duty to one who is unknown and remote in time and place, this duty is limited by considerations of the nature of the relationship between the parties as well as the foreseeability of the injury (*Renslow v. Mennonite Hosp.* (1977), 67 Ill.2d 348, 367 N.E.2d 1250.) In *Renslow*, the court defined duty as "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection" (67 Ill.2d 348, 356), and noted at p. 357 that the law recognizes only "a limited area of transferred negligence." In other words, absent a special relationship or foreseeable injury, negligence or breach of duty as to one person which ultimately and in fact injures another to whom no duty is owed is not negligence as to

the latter person. *Palsgraf v. Long Island R.R. Co.* See *Martin v. Kiendl Const. Co.*

It is my belief that this court should not make the policy decision to transfer the duty owed to the patient and consumer of the drug to the general public. To do so would extend liability of defendants to an indeterminate class for an indeterminate time in an indeterminate amount. (See *Ultramares Corp. v. Touche* (1931), 255 N.Y. 170, 174 N.E. 441). Our supreme court has carefully circumscribed the limits of transferred negligence to one intimately related individual in *Renslow v. Mennonite Hosp.* (infant unborn at the time of alleged negligence to mother), and a well-defined class in *Rozny v. Marnul* (1969), 43 Ill.2d 54, 250 N.E.2d 656, (purchasers or lenders who might foreseeably use a plat that was negligently surveyed for a third party.)

The majority recognizes that it is extending the duty to warn of adverse drug effects to the general public, but asserts that this burden on defendants is outweighed by the risks to the general public. The majority fails to acknowledge, however, that the potential liability is overwhelming. The imposition of tort liability upon doctors and hospitals to any person who may be injured by their patients will produce a "chilling effect" on drug therapy for psychiatric patients. The existence of such a legal obligation would require intimate and constant surveillance and would discourage doctors and hospitals from treating patients with medications which can be beneficial. (See *Lance v. Senior* (1967), 36 Ill.2d 516, 224 N.E.2d 231.) The heavy burden sought to be imposed on defendants is not outweighed by the risks to the general public, and sound policy considerations militate against that imposition of tort duty here.

Furthermore, the negligence count against Michael Reese is deficient because it does not allege that a hospital breached a recognized duty to the patient McCarthy, resulting in plaintiff's injury. There can be no transferred

duty to a non-patient where there is no duty to warn the patient. A hospital may be liable for injuries suffered by a patient under its care on two distinct theories. (*Ingram v. Little Company of Mary Hosp.* (1982), 108 Ill. App.3d 456, 438 N.E.2d 1194.) The hospital may be liable both for its physician-agent's misconduct on a respondeat superior theory or for a violation of an independent duty owed by the hospital to review and supervise medical care administered to a patient. *Darling v. Charleston Community Memorial Hosp.* (1965), 33 Ill.2d 326, 211 N.E.2d 253, *cert. denied* (1966), 383 U.S. 946; *Johnson v. St. Bernard Hosp.* (1979), 79 Ill. App. 3d 709, 399 N.E.2d 198.

There is no allegation that the physicians who prescribed the drugs to McCarthy were agents or employees of Michael Reese. Nor does the complaint allege that the agents or employees of Michael Reese negligently administered the drugs to McCarthy. Rather, plaintiff alleges that Michael Reese prescribed certain drugs to McCarthy without adequate warning to him. The decision to prescribe certain drugs is within the discretion of the treating physician. (*Mahr v. G.D. Searle & Co.* (1979), 72 Ill. App.3d 540, 390 N.E.2d 1214.) Consequently the duty to warn the patient of adverse drug effects is owed by the physician, not the hospital. Where a negligence complaint against a hospital merely alleges matters within the duty of care owed by the treating physicians, it is properly dismissed. *Pickle v. Curns* (1982), 106 Ill. App.3d 734, 435 N.E.2d 877.

With respect to the strict product liability claims against the drug manufacturers, E. R. Squibb & Sons, Inc. and Smithkline Corp., and Michael Reese, the complaint is likewise deficient. In a "failure to warn" strict product liability action, [t]he product is in a 'defective condition unreasonably dangerous' (Restatement (Second) of Torts, sec. 402A (1965)), not because of some defect inherent in the product itself, but because of the absence of an ade-

quate warning accompanying the product." (*Woodhill v. Parke Davis & Co.* (1980), 79 Ill.2d 26, 30, 402 N.E.2d 194.) It is the general rule that the manufacturer of prescription drugs has the duty to communicate a warning of potential hazards to the physicians, not to the patient, consumer or the general public. (See *Stevens v. Parke, Davis & Co.* (1973), 9 Cal.3d, 51, 507 P.2d 653.) The rationale for the foregoing rule is that the physician is the "learned intermediary" who decides to treat the patient with a particular drug and it would be virtually impossible for a manufacturer to warn the patient or general public directly. *Carmichael v. Reitz* (1971), 17 Cal. App.3d 958, 95 Cal. Rptr. 381.

The present complaint alleges that defendants drug companies and hospital manufactured or supplied a product which "failed to contain adequate warnings of dangerous propensities." Plaintiff does not charge that defendants failed to adequately warn the treating physicians. Thus plaintiff's complaint fails to allege the breach of one duty that Illinois courts have recognized as a valid failure to warn product liability claim against a manufacturer. Nor does plaintiff allege facts to justify the legal conclusion that the warnings were inadequate, such as failure to warn the physician that a drug consumer should not use alcoholic beverages and then drive. (See *Friederich v. Board of Education* (1978), 59 Ill. App.3d 79, 375 N.E.2d 141.) Where a complaint fails to allege facts sufficient to set forth the essential elements of a cause of action, it is properly dismissed. *Jones v. Eagle II* (1981), 99 Ill. App.3d 64, 424 N.E.2d 1253.

Additionally, the hospital does not have an independent duty to warn the physician or patient. The treating physician receives the information from the drug companies or from his own sources and exercises the professional judgment to prescribe a certain drug. (*Mahr v. G.D. Searle & Co.*) Although the hospital is in the chain of distribution

of the product, the physician directs the hospital to supply the drug to the patient. Therefore, the physician's role in the course of supplying the drug from the manufacturer to the patient insulates the hospital from strict tort liability. See *Jones v. Irvin* (S.D. Ill. 1985), 602 F. Supp. 399; *Ullman v. Grant* (1982), 114 Misc.2d 220, 450 N.Y.S.2d 955.

Moreover, in *Winnett v. Winnett* (1974), 57 Ill.2d 7, 310 N.E. 2d 1, our supreme court has limited the scope of a manufacturer's liability to a non-user under a strict product liability theory. There, at p. 11, the court stated that "the liability of a manufacturer properly encompasses only those individuals to whom injury from a defective product may reasonably be foreseen." As with negligence actions, foreseeability is measured by what is objectively reasonable to expect, not merely what might conceivably occur. It was not objectively reasonable for the manufacturers to anticipate that a psychiatric patient treated by individual physicians in a hospital would be discharged from the hospital, consume alcoholic beverages, drive a vehicle in which plaintiff was a passenger, and collide with a tree, injuring plaintiff. Since plaintiff's injury was not reasonably foreseeable and the manufacturers and hospital have no duty to warn a non-patient, non-user of a prescription drug, the trial court properly dismissed the strict product liability counts. See *Bobka v. Cook County Hosp.* (1981), 97 Ill. App.3d 351, 422 N.E.2d 999.

As with the negligence counts, strong public policy considerations preclude the imposition of strict liability on the drug manufacturers and hospital in this instance. One of the principal reasons for the rule of strict liability in tort is the "public interest in human life and health." (*Suvada v. White Motor Co.* (1965), 32 Ill.2d 612, 619, 210 N.E.2d 182.) It has been recognized that in certain cases the protection of human life and health would not be enhanced, but would be diminished by the imposition of strict liability. (*Greenberg v. Michael Reese Hosp.* (1980), 83 Ill.2d 282,

415 N.E.2d 390. See Restatement (Second) of Torts, Sec. 402A, comment k (1966).) If strict tort liability is extended to non-users of prescription drugs, the potential costs to the drug manufacturers will outweigh the efficacy of producing and selling them. The public may be deprived of effective drugs and medications beneficial to the treatment of disease. Therefore, the public interest in human life and health demands that the drug manufacturers not be held liable to non-users of prescription drugs.

Similarly, strict liability should not be imposed on the hospital which supplies the drugs to the patient. "[I]n cases which deal with the conduct of individuals or institutions which themselves are pledged to protect human life and health, precautions must be taken to avoid an ultimate diminution of protection." *(Greenberg v. Michael Reese Hospital.)* In *Greenberg*, the court held that a hospital, as a provider of medical services, cannot be sued in strict liability in tort for an alleged failure to warn of the dangerous effects of x-ray radiation treatments administered by the hospital. Public policy dictates that the hospital not be held strictly liable in tort for supplying prescription drugs to a patient who later injures a nonpatient who did not consume the drug.

Since I believe that the trial court properly denied plaintiff's motion for leave to file a fourth amended complaint, which incidentally was not furnished to the trial court, I would affirm the judgment of the trial court.

(1) Orders Appealed From

(a) Order of May 20, 1981 (R. 545)

"This cause coming on to be heard upon the motion of Defendant, Dr. Tracer, to dismiss Plaintiff's Complaint and upon Motion of Defendant, Dr. Fine for Judgment on the Pleadings, the court having heard the arguments of counsel, being fully advised in the premises, due notice having been given:

"It Is Hereby Ordered that:

"Defendant Dr. Tracer's Motion to Dismiss is hereby sustained and granted with prejudice.

"Defendant Dr. Fine's Motion for Judgment on the pleadings is hereby sustained and granted with prejudice.

"It Is Further Ordered that the pending motion for an in camera inspection of certain documents presented on behalf of Dr. Fine is continued generally." (R. 545)

(b) Order of September 3, 1981, (R. 661)

"This matter coming on to be heard upon the motion to dismiss of E. R. Squibb & Sons, Inc. and Smithkline Clinical Laboratories, Inc. and the parties having filed memorandum, presented oral arguments and the Court being fully advised in the premises,

"It Is Hereby Ordered:

"1. The motion to dismiss of E. R. Squibb & Sons, Inc. and Smithkline Clinical Laboratories, Inc. are granted with prejudice;

"2. There is no just reason for delaying enforcement or appeal.

"3. Plaintiff's oral requests made this date to make this order of dismissal without prejudice and for leave to file a fourth amended complaint is denied.

"4. Plaintiff's motions to strike Squibb's and Smithkline's motions to dismiss are denied." (R. 661)

(c) First Order Of September 4, 1981, (R. 662)

"This cause coming on to be heard, all parties being present and the court being fully advised in the premises,

"It Is Hereby Ordered That:

"1. Plaintiff's motion to vacate the order of May 20, 1981, which dismissed Count II of plaintiff's Third Amended Complaint as to Dr. Henry K. Fine is denied.

"2. It is further ordered that:

(a) As to Defendant Fine, the order of May 20, 1981, was final.

(b) Today's order denying vacation of the May 20, 1981 order is final and appealable as to Defendant Fine.

(c) Plaintiff's oral motion of Sept. 3, 1981 to the order of May 20, 1981, to be without prejudice and to modify allow plaintiff to file an amended pleading is denied in exercise of the court's discretion.

(d) Plaintiff's oral motion of Sept. 3, 1981, for leave to file an amended complaint is denied.

(e) The basis for this Court's orders herein is that none of the four complaints already filed by plaintiff has differed as to the language of the warnings given. No duty [sic. _____, illegible] [has been shown?] as to the plaintiff on the part of Dr. Fine under the facts alleged in any of plaintiff's complaints." (R. 662)

(d) Second Order Of September 4, 1981 (R. 663

On the same day (September 4, 1981) the following order was also entered:

"This cause coming on to be heard on the Motion of Michael Reese Hospital and Medical Center to dismiss Counts I, IV and V of the plaintiff's Third Amended Complaint against Michael Reese Hospital and Medical Center, due notice having been given and the Court being fully

advised in the premises;

"It is hereby ordered that said motion of Michael Reese Hospital and Medical Center to dismiss counts I, IV and V of plaintiff's Third Amended Complaint is hereby granted and counts I, IV and V of plaintiff's Third Amended Complaint are hereby dismissed as against Michael Reese Hospital and Medical Center with prejudice and [sic. _____ illegible] [sic. and plaintiff's motion to make (?)] said dismissal without prejudice and for leave to file a Fourth Amended Complaint as to Counts I, IV and V against Michael Reese Hospital and Medical Center is hereby denied in the exercise of the court's discretion as all complaints thus far filed against Michael Reese Hospital and Medical Center have failed to allege any facts giving rise to a duty on the part of Michael Reese Hospital and Medical Center to the plaintiff and plaintiff has not tendered a fourth amended complaint to the court.

"It is further ordered that this court finds no just reason to delay enforcement of or appeal from this order." (R. 663)

(e) Third Order Of September 4, 1981 (R. 664)

"This cause coming on to be heard on motion of plaintiff for rehearing to vacate the court's order of 5/20/81 dismissing plaintiff's complaint in reference to defendant Tracer and granting defendant's motion to dismiss the Third Amended Complaint, the court having considered the memoranda of law filed by the parties, the court having heard oral arguments by both parties:

"The Court hereby finds and orders that

(1) Plaintiff's motion to vacate order of 5/20/81 is Denied because all factual allegations made by plaintiff did not give rise to duty to Kirk from Tracer.

(2) Plaintiff's oral motion on 9/3/81 to amend order of 5/20/81 to be without prejudice and to amend complaint is denied in the exercise of court's discretion because all

factual allegations made by Plaintiff did not give rise to a duty from Tracer to Kirk and no 4th Amended Complaint was tendered.

3. Plaintiff's oral Motion of 9/3/81 to amend the complaint is denied because order of 5/20/81 is final.

4. The court finds there is no just reason to delay enforcement or appeal of this order." (R. 664)

Supreme Court, U.S.
FILED
FEB 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES D. KIRK,

Petitioner,

v.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB AND SONS, INC., and SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT, SMITHKLINE CLINICAL LABORATORIES, INC.

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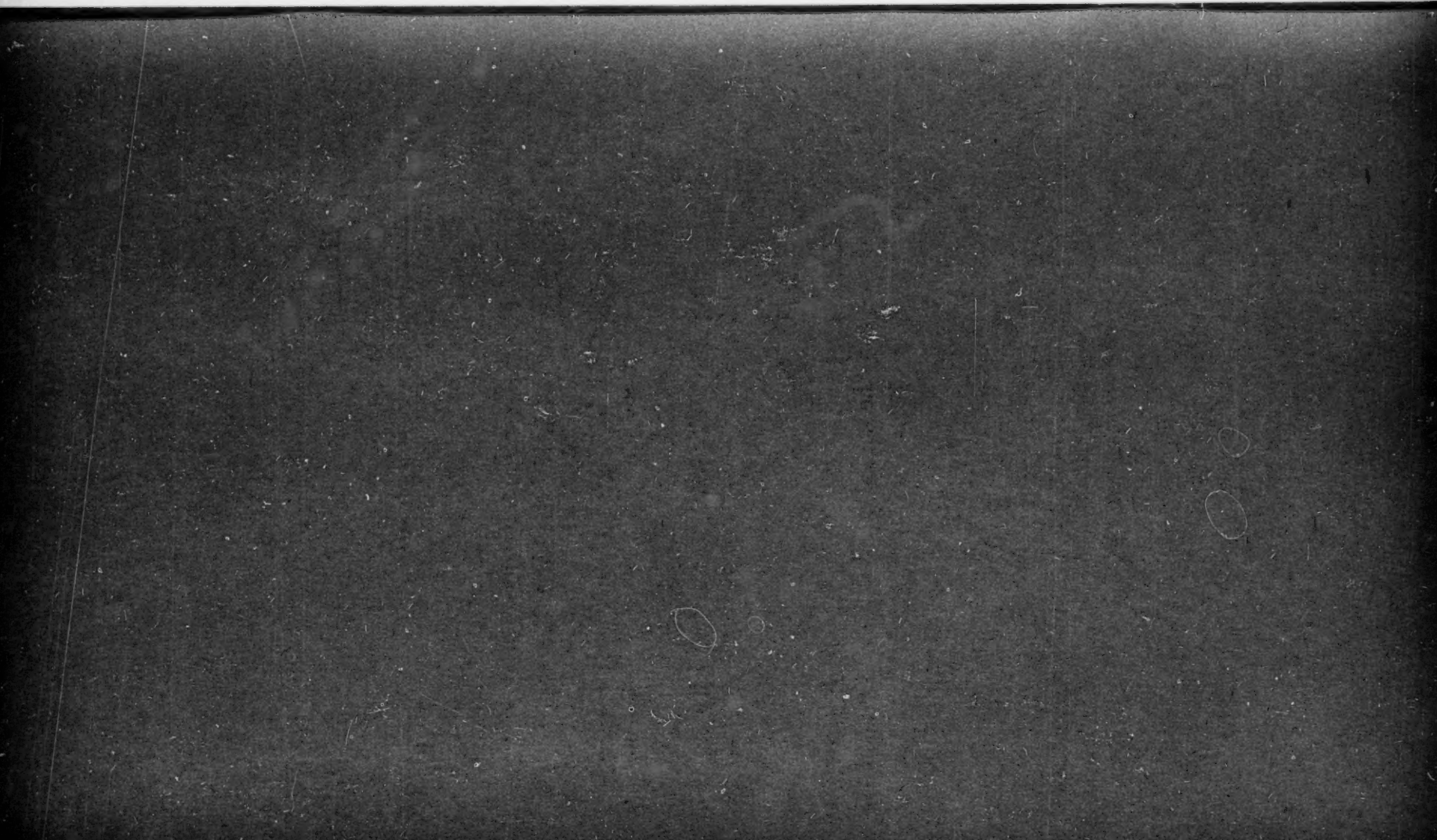

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should exercise *certiorari* jurisdiction when due process and equal protection contentions were never raised in, or decided by, the state courts;

II. Whether due process and equal protection claims made for the first time on a Petition for Rehearing from a state court judgment constitute a viable due process question when the highest state court summarily denied the Petition without any reference to the newly raised due process and equal protection contentions;

III. Whether this Court should exercise *certiorari* jurisdiction to review a state court decision when only state tort law regarding a manufacturer's duty to warn is at issue; and

IV. Whether this Court should exercise *certiorari* jurisdiction when the decision below was based upon adequate and independent state grounds.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties[1] to the proceedings in the court whose judgment is sought to be reviewed.

[1] This Respondent's juridical name and parent is SmithKline Beckman Corporation. All subsidiaries are wholly owned, save SKBL, Inc., which is the only non-wholly owned first tier subsidiary of SmithKline Beckman Corporation.

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No. 87-1137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES D. KIRK,

Petitioner,

v.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB AND SONS, INC., and SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT, SMITHKLINE CLINICAL LABORATORIES, INC.

SUMMARY OF ARGUMENT

The Court should deny the Petition because Petitioner failed to timely raise any federal question in the state court in order to meet the jurisdictional requirements of the Court. Petitioner raised due process and equal protection arguments only after the Illinois Supreme Court

had rendered its opinion in July of 1987. The Court has consistently refused to exercise its jurisdiction when federal questions are raised for the first time in a Petition for Rehearing and when the state court does not consider or address the federal questions in the order or decision rendered in response to the Petition for Rehearing.

The Petitioner's due process and equal protection claims have no substantive basis, for the Illinois Supreme Court decisions and rules provide that all parties shall have an equal opportunity both to present and to oppose motions in the appellate court and the supreme court of Illinois. Moreover, the Court has recently denied a Petition for Writ of Certiorari on the very issue of the constitutional propriety of the Illinois Supreme Court procedures that Petitioner seeks once again to present to the Court. *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E.2d 685, *cert. denied*, ___ U.S. ___, 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986).

The Petitioner erroneously asserts that he was denied a fair trial by the dismissal of his Third Amended Complaint. Petitioner failed to comply with the pleading rules of the State of Illinois, and the Court has consistently declined to exercise its jurisdiction in cases regarding the procedural rules of the States. Moreover, the Court has also consistently declined to exercise its jurisdiction in cases involving the interpretation of state tort law, *e.g.* the duty to warn at issue in the instant case.

Finally, the decisions in the state courts were based upon an adequate and independent state ground. No federal question was ever raised; the state court judgments rest solely on state tort issues. Therefore, the Court should decline to exercise its jurisdiction.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE PETITIONER FAILED TO RAISE ANY DUE PROCESS OR EQUAL PROTECTION CLAIMS IN THE STATE COURT PROCEEDING UNTIL HE FILED A PETITION FOR REHEARING AFTER THE JULY, 1987, ILLINOIS SUPREME COURT OPINION, AND THEREFORE THE CLAIMED CONSTITUTIONAL QUESTIONS HAVE BEEN WAIVED AND SHOULD NOT BE REVIEWED BY THIS COURT UNDER ITS CERTIORARI JURISDICTION.

Petitioner has no just basis for asking this Court to exercise *certiorari* jurisdiction. Petitioner's due process and equal protection contentions were raised for the first time in a Petition for Rehearing filed in the Illinois Supreme Court. Petitioner did not raise them in the trial court. He did not raise them in the Illinois Appellate Court. Nor were they briefed or argued by Petitioner in the Illinois Supreme Court; only in his Petition for Rehearing from the adverse final judgment of that court did Petitioner first raise due process and equal protection arguments. Since Petitioner had ample prior opportunity to obtain a ruling on his alleged due process and equal protection questions but failed to raise them before the decision of the Illinois Supreme Court, Petitioner has waived his due process and equal protection challenge under Illinois law. *Clore v. Fredman*, 59 Ill. 2d 20, 319 N.E.2d 18 (1974); *Flynn v. Vancil*, 41 Ill. 2d 236, 242 N.E.2d 237 (1968); *Hillblom v. Ivancsits*, 76 Ill. App. 3d 306, 395 N.E.2d 119 (1979).

The long established rule is that this Court has no jurisdiction to review a federal question unless it was both raised and decided in the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Crowell v. Randall*, 35 U.S. (10 Pet.) 368, 391 (1836). In the instant case, the Petitioner did not timely raise his due process and equal protection arguments in the state courts, and, as the opinions of those courts demonstrate, the state courts did not decide or address those constitutional issues. Petitioner, therefore, is barred from raising these claims in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928).

Moreover, raising a federal question for the first time in a Petition for Rehearing, as Petitioner has attempted to do in the instant case, is insufficient for federal jurisdictional purposes. This Court has exercised its jurisdiction only when the highest state court has actually entertained a Petition for Rehearing and has expressly rejected the federal question issues. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). This possible exception is not satisfied, however, by the state court's modifying its opinion without considering the federal questions—as is the situation in the instant case. Petitioner must demonstrate that the state court considered the federal question, and denied a rehearing, notwithstanding. *Forbes v. State Council of Virginia*, 216 U.S. 396, 399 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-37 (1908).

Furthermore, this is not a case where Petitioner can claim "surprise." The due process issue that Petitioner is now claiming did not originate in the Illinois Supreme Court's decision. The complaint was dismissed in the trial court, but the due process argument was not presented until

years later at the time the Petition for Rehearing was filed in the Illinois Supreme Court. Moreover, Petitioner could have presented the same arguments during the nearly two years throughout which this matter was pending in the Illinois Supreme Court. At no stage in the proceedings did he do so. For these reasons, the Petition for Writ of Certiorari should be denied.

II.

PETITIONER'S DUE PROCESS AND EQUAL PROTECTION CLAIMS ARE TOTALLY DEVOID ON THE MERITS.

Not only are Petitioner's due process and equal protection claims not properly presented to this Court for the exercise of its *certiorari* jurisdiction but also they are utterly devoid on the merits. The 1970 Constitution of the State of Illinois, Article VI, Section 16, provides as follows:

> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules.

Petitioner erroneously argues that the Illinois Supreme Court has failed to comply with its rules and therefore has violated Petitioner's constitutional rights. In *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E. 2d 685, *cert. denied*, ____ U.S. ____, 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986), the Illinois Supreme Court specifically addressed the issue of adherence to its rules. Therein, the court took note of its 1979 order providing that Motions for Reconsideration of denials of Petitions for Leave to Appeal are not to be accepted by the Clerk of the Court. In *Johnson*, the Illinois Supreme Court also stated that even if "permitting the filing of a motion for reconsideration [arguably] consti-

tuted a violation of [the 1979] order and of due process," the court had protected the due process rights of the litigants by permitting a Motion for Leave to File a Motion for Reconsideration to be filed under its Rule 361. *Id.* at 472-73, 490 N.E.2d at 686-87. So long as the court does not deprive litigants of their general access to the court through the motion process, it does not deprive litigants of constitutional due process. So long as the Illinois Supreme Court abides by its Rule 361, it does not deprive litigants of due process because of the authority vested in the Illinois Supreme Court by the 1970 Constitution of the State of Illinois.

In the instant case, the Record demonstrates that the Petitioner cannot legitimately complain that, as applied to him, the Illinois Supreme Court violated any constitutionally-protected rights. The Motion for Leave to File the Motion for Reconsideration was filed jointly by the Respondents with the Clerk of the Illinois Supreme Court pursuant to Rule 361 on February 25, 1986. The Notice of Motion, the Motion for Leave to File the Motion for Reconsideration, the Motion for Reconsideration, and the Mailing Affidavit were sent by Respondents to the Petitioner on February 24, 1986.

On February 28, 1986, the Illinois Association of Defense Trial Counsel, by its attorneys, mailed to the Clerk of the Illinois Supreme Court and to the attorneys of record herein, including Petitioner's counsel, both its Petition for Leave to Intervene as Amicus Curiae and its Motion in Support of the Motion for Reconsideration. This Respondent respectfully submits that on the first page of the Illinois Defense Trial Counsel's Motion in Support of Reconsideration, the movant set forth the holding in the Illinois Supreme Court's decision in *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E. 2d 685, *cert. denied*, ___ U.S. ___, 107

S. Ct. 113, 93 L. Ed. 2d 60 (1986), which as aforementioned, affirmed the Illinois Supreme Court's jurisdiction to reconsider the denial of Petitions for Leave to Appeal in appropriate instances. Petitioner, therefore, was expressly advised of the Illinois Supreme Court's opinion governing Motions for Reconsideration.

Review of the *Johnson* decision and of Rule 361 reveals that Petitioner's proper procedure upon receipt of the Motion for Leave to File the Motion for Reconsideration was either to file a written objection with the Clerk of the Supreme Court within five days after Respondents mailed their joint motion or to seek, either from the court or one of the judges, further time in which to file his objections. Rule 361 provides as follows in pertinent part:

> 361. Motions in Reviewing Court
>
> (b) (2) *Objections to a motion shall be in writing and be filed, with proof of service, within three days after personal service of the motion, or five days after mailing of the motion if service is by mail, or within such further time as the court or a judge thereof may allow.* Except by order of court, replies to objections will not be allowed and oral arguments on motions will not be heard.

Ill. Rev. Stat. ch. 110(A), para. 361 (1985) (emphasis added).

Petitioner, however, did not file an objection within five days after the Motion for Leave to File the Motion for Reconsideration was mailed. Indeed, Petitioner totally ignored the rule and failed to seek any further time from the court or a judge thereof in which to file his objections to Respondents' motion. The Illinois Supreme Court Docketing Sheet shows no request whatsoever by Petitioner for an extension of time to file objections to Respondents' motion. The Illinois Supreme Court did not

rule on Respondents' motion until March 18, 1986; yet Petitioner had taken no action in his own behalf as provided both by Illinois case law in *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E.2d 685, *cert. denied*, ____ U.S. ____, 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986), and by Illinois Supreme Court Rule 361, which Rule was promulgated under the 1970 Constitution of the State of Illinois.

Indeed, the only action taken by the Petitioner vis-a-vis the Respondents in the Illinois Supreme Court was the filing of an Appearance. The Appearance that Petitioner filed on March 3, 1986, in the Illinois Supreme Court, which was the only pleading filed by the Petitioner before the court ruled on Respondents' motions, can be construed only as acknowledgment of the Illinois Supreme Court's jurisdiction over the appeal.

After the Illinois Supreme Court granted Respondents' Motion for Reconsideration on March 3, 1986, the instant case remained pending in that court until the decision in July of 1987. At no time while the case was pending in the Illinois Supreme Court did the Petitioner assert that his due process or equal protection rights had been violated. Indeed, Petitioner could not validly assert any violation of his due process and equal protection rights, because no violation of his constitutional rights existed. The procedures of the Illinois Supreme Court as applied to Petitioner were in full accord with the concepts of procedural due process and equal protection. This Court should not now permit Petitioner to seek further relief on the grounds that the Illinois Supreme Court had no jurisdiction over the appeal when Petitioner failed to protect his rights by objecting to the procedures set forth by the Illinois Supreme Court, which procedures were specifically established to protect the rights of litigants in that court under the statutes and the Constitution of the State of Illinois.

III.

THE ILLINOIS SUPREME COURT PROPERLY UPHELD THE TRIAL COURT'S DISMISSAL OF PETITIONER'S THIRD AMENDED COMPLAINT, SPECIFICALLY FINDING THAT THIS RESPONDENT DRUG MANUFACTURER HAD NO DUTY TO WARN THE GENERAL PUBLIC.

In the Petitioner's Third Amended Complaint, which Respondent's motions to dismiss attacked, Petitioner failed to allege that the warning to the treating and prescribing physicians was inadequate. Nor did the Petitioner allege any facts to justify a legal conclusion that the warnings to the prescribing and treating physicians were inadequate. Rather, the Petitioner merely alleged that the warning to the patient and general public was inadequate. Both in the Third Amended Complaint and throughout the state court proceedings, the Petitioner argued that adequate warning of the dangerous propensities of the ethical drugs involved was not provided to the patient and to the general public.

The Respondents properly sought dismissal of Petitioner's Third Amended Complaint. Respondents contended that the Third Amended Complaint failed to allege a recognized duty owed by an ethical drug manufacturer. Petitioner stood on the facially deficient pleading, again waiving any right to amend his Complaint, and the trial court granted the Motion to Dismiss with prejudice. The Illinois Supreme Court upheld the trial court's dismissal finding "no duty on the part of manufacturers of prescription drugs to directly warn patients" and "no duty to warn a nonuser as Kirk" (Petition Appendix 7a).

Petitioner now claims that he was deprived of his due process right to a fair trial because his Third Amended Complaint was dismissed without allowing Petitioner an opportunity to present evidence to a trier of fact in sup-

port of his allegations. Yet, even were all of Petitioner's well-pleaded allegations deemed true, as the Illinois Supreme Court considered them when reviewing the lower court decisions, the Third Amended Complaint was deficient, for it failed to allege a duty owed by the Respondents. Therefore, the state courts were not required to address the issue of whether the Respondents had breached a duty to warn because Petitioner had never alleged said duty in his four attempts to state a cause of action against the Respondent.

Moreover, even had the Illinois Supreme Court found that the Petitioner sufficiently alleged a breach of a viable duty owed by ethical drug manufacturers, the court properly concluded that a decision on the adequacy of the warnings given by the manufacturers to the prescribing and treating physicians was "premature and puts the cart before the horse" (Petition Appendix at 7a). Contrary to Petitioner's arguments, the court was not required to consider whether the warnings given to the physicians were adequate (Petition at 13-14). Rather, the court held that before considering the adequacy of the warnings, the facts alleged by the Petitioner "demonstrate *on their face* that plaintiff would never be entitled to recover" (Petition Appendix at 9a). The court upheld the lower court's dismissal because the alleged facts demonstrate that the Respondent should not have foreseen that the drugs "would be dispensed without warnings by the physicians, that the patient would be discharged from the hospital, drink alcohol, drive a car, lose control of his car, hit a tree and injure the passenger, Kirk, on the same day" (Petition Appendix at 9a).

The Petitioner was not deprived of any due process right to a fair trial or fair access to the courts. The disputed factual issue, which Petitioner argues was improperly de-

cided by the state court, was not at issue in the court's review of the dismissal of Petitioner's Third Amended Complaint. Before any court could address the adequacy of the warning, Petitioner was required to sufficiently plead a foreseeable duty owed to Petitioner by the Respondent ethical drug manufacturers. The Illinois Supreme Court properly held that Petitioner had not pleaded such a duty under Illinois law. Therefore, this Court should not consent to consider Petitioner's argument regarding this narrow issue of state tort law.

IV.

THIS COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court should not exercise jurisdiction to decide the instant case because the decision of the Illinois Supreme Court rested solely on an adequate and independent state ground. No federal question was ever involved in the proceeding below. The judgment rests squarely and only on state tort law. State court judgments that are based solely on state law should not be reviewed by this Court. *Herb v. Pitcairn*, 324 U.S. 117 (1945). The only power that this Court possesses to consider and correct state judgments is to the extent that these judgments incorrectly decide federal rights. *Id.* at 126.

This Court has previously indicated that respect for the independence of state courts, as well as the policy of not rendering advisory opinions, is the foundation for this Court's refusal to decide cases in which an adequate and independent state ground exists. This Court has emphasized that because of its respect for state courts, it will not decide issues of state law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Any decision by this Court in the in-

stant case, which case rests solely on the tort law of the State of Illinois, would necessarily impinge upon state law. It is imperative that this Court deny the Petition herein because the Illinois Supreme Court decision is based upon an adequate and independent state ground; therefore, this Court should not exercise its jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent SmithKline Clinical Laboratories, Inc. respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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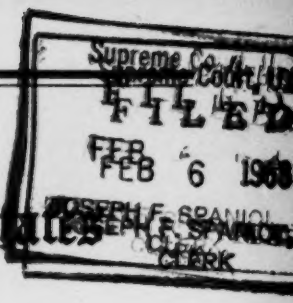
February 4, 1988

No. 87-1137



IN THE

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Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS, MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., AND HENRY K. FINE, M.D.

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On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS, MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., AND HENRY K. FINE, M.D.

Respondents, MICHAEL REESE HOSPITAL AND MEDICAL CENTER,* IRVING H. TRACER, M.D., AND HENRY K. FINE, M.D., respectfully request that this Court deny the petition for a writ of certiorari to the Supreme Court of Illinois. That opinion is reported at 117 Ill. 2d 507, 513 N.E. 2d 387.

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* Pursuant to Supreme Court Rule 28.1, Michael Reese Corporation is the parent company of Michael Reese Hospital and Medical Center. Michael Reese Second Century Foundation, Michael Reese Health Network, Health Outreach, EMRE, and Michael Reese Health Plan are affiliates.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE ILLINOIS SUPREME COURT'S DECISION TO HEAR THIS CASE DID NOT DEPRIVE PETITIONER OF ANY CONSTITUTIONAL RIGHTS.

Petitioner's attempt to make a constitutional issue out of the Illinois Supreme Court's decision to review the decision of the Illinois Appellate Court in this case borders on the ludicrous. Indeed, petitioner did not raise any constitutional challenge in opposition to respondents' motion for leave to file a motion for reconsideration and in fact filed no response in opposition to the motion whatsoever. Moreover, petitioner's 102 page Supreme Court brief uttered not one word in opposition to the method by which the Supreme Court granted review. It was only in the petition for rehearing, after petitioner had lost on the merits, that the issue was first raised. *See, Herndon v. Georgia,* 295 U.S. 441, 443 (1935) (attempt to raise constitutional issue for first time in state court petition for rehearing comes too late unless actually considered and decided by state court).

Furthermore, no matter when raised, petitioner's contention of a secret, covert, improper procedure is wholly without merit when:

1) The procedure for filing a motion for leave to file a motion for reconsideration was followed in numerous prior cases including *Johnson v. Colley,* 490 N.E. 2d 685, 111 Ill. 2d 468 (1986), *cert. den.* 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986), a decision which was published by the Illinois Supreme Court almost three weeks *prior* to the filing of the respondents' motion in this case.

2) The *Colley* case rejected the same constitutional arguments raised by petitioner herein, noting that under the provisions of Article VI, Sections 4, 6 and 16 of the Illinois Constitution of 1970, the Illinois Supreme Court is vested with rule making authority sufficiently comprehensive to regulate all aspects of the appellate process (*Colley, supra,* 490 N.E. 2d at 606-687).

3) The Illinois Supreme Court, like all other courts of appeal, has the inherent power to reconsider any order or decision, *Whitcanock v. Nelson,* 81 Ill. App. 3d 186, 400 N.E. 2d 998 (3d Dist. 1980).

Petitioner's further assertion that there was something improper or sinister in the fact that respondents filed their motion for leave to file a motion for reconsideration with the individual justices of the Illinois Supreme Court at their home offices (Petn., p. 5) has been a requirement in the Supreme Court rules since 1982! Ill. Ann. Stats., Ch. 110A, Section 361 (Committee Comments, p. 16). Nothing in the cited cases of *United States v. Nixon,* 418 U.S. 683 (1974) or *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982) supports any aspect of petitioner's argument. *Nixon* involved the enforcement of a subpoena *duces tecum* under Fed. Rule Crim. Proc. 17(c). *Logan* held that a party could not be deprived of judicial review of his case simply because certain procedures had not been carried out by a state agency in a timely fashion. Here, petitioner's non-sequitur contention is that somehow error occurred because the Illinois Supreme Court did grant review and did decide the case on its merits.

Petitioner's procedural arguments are unfounded.

II.

THE ILLINOIS SUPREME COURT DECISION HAS NOT GRANTED "BLANKET IMMUNITY" TO PHYSICIANS OR OTHER MEDICAL CARE PROVIDERS.

Petitioner's repeated overstatements and misstatements of the Illinois Supreme Court's decision do not create a constitutional issue—particularly when no such constitutional issue was ever presented in the state court at any time, *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (Supreme Court lacks jurisdiction over constitutional question never raised or decided below) and the case was decided solely on state tort law grounds, *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) (Supreme Court will not review state court judgments that rest on adequate and independent state law grounds).

Furthermore, the Illinois Supreme Court did not hold that "a doctor who prescribes psychotropic drugs now has no legal obligation to convey a thirty second warning to the patient not to operate a motor vehicle or consume alcohol while under the influence of mood-altering medication" (Petn., p. 17). On the contrary, the Illinois Supreme Court expressly recognized that the physician in this case acknowledged "a duty to warn his patient about adverse effects that may result from taking a prescription drug" (Appndx. Petn., p. 17a). However, the Illinois Supreme Court sensibly held that this duty to warn should not be extended beyond a physician's patients to the world at large, thereby subjecting physicians and hospitals to boundless liability to an unknown and unlimited class of people who were never treated by any physician and were never a patient at any hospital.

Contrary to petitioner's contention, similar limitations have been applied to professional tort liability in other

fields as well. *See e.g., Pelham v. Griesheimer*, 92 Ill. 2d 13, 17, 440 N.E. 2d 96 (1982) (attorneys not liable to all foreseeable claimants as a result of malpractice); *Badische Corp. v. Arnold Caylor*, 825 F.2d 339 (11th Cir. 1987) (accountants not liable to all foreseeable persons relying on negligently prepared financial statement).

Furthermore, the Illinois Supreme Court soundly distinguished the authorities relied upon by petitioner (Petn., p. 18), as cases involving situations where defendant had actual control of the "physical custody" of the person alleged to be dangerous or to have dangerous propensities (Appndx. Petn., p. 18a).

The Illinois Supreme Court's decision is sound state tort law, and in no event presents any constitutional issue for this Court's review.

CONCLUSION

For the above stated reasons, as well as those reasons and authorities set forth in the Briefs in Opposition filed by E. R. Squibb & Sons, Inc. and SmithKline Clinical

Laboratories, Inc., these respondents respectfully urge this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 87-1137

Supreme Court, U.S.
FILED
FEB 3 1988
JOSEPH E. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

JAMES D. KIRK,

Petitioner,

vs.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB & SONS, INC., AND SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

BRIEF IN OPPOSITION OF E.R. SQUIBB & SONS, INC.

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Respondents.

BRIEF IN OPPOSITION OF E.R. SQUIBB & SONS, INC.

Respondent, E.R. Squibb & Sons, Inc.* (hereinafter "Squibb") respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Illinois Supreme Court's opinion in this case. That opinion is reported at 117 Ill.2d 507, 513 N.E.2d 387.

*E.R. Squibb & Sons, Inc. is a wholly-owned subsidiary of Squibb Corporation.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE ILLINOIS SUPREME COURT'S DECISION TO HEAR THE CASE ON ITS MERITS DID NOT INFRINGE ANY FEDERAL RIGHTS OF PETITIONER

A. Petitioner's Claim Was Waived In The State Proceedings And Was Not Preserved For Review By This Court

Petitioner's contention that the Illinois Supreme Court should not have decided the merits of this case was waived by petitioner. Although he now seeks to assert a federal question, that question has not been preserved for review. This Court does not have jurisdiction to review the question petitioner seeks to raise because that question was not raised and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The petition omits certain facts which show that the issues petitioner now seeks to raise were waived by him below. Petitioner did not file an answer to any of the petitions for leave to appeal which were filed in the Illinois Supreme Court. Such an answer is expressly permitted by Illinois Supreme Court Rule 315(e). Ill.Rev.Stat., 1985, ch. 110A Par. 315(e). More importantly, although he now seeks to challenge the Illinois Supreme Court's granting of respondents' motions for leave to file a motion for reconsideration and motion for reconsideration, petitioner did not file any objection to those motions when they were filed. Those motions were filed and served by mail on February 24, 1986 and not ruled upon until March 18, 1986. If petitioner wished to object to the procedure sought by the motions he had more than ample opportunity to file his objections prior to the Court's ruling.

Additionally, petitioner did not object to the Illinois Supreme Court's reconsideration of the case on the merits either in his brief to the Court or at oral argument. It was not until after the Court had filed a decision on the merits

adverse to petitioner that, in a petition for rehearing, petitioner first asserted that the Illinois Supreme Court should not have decided the case on the merits. Having acquiesced and participated in the proceedings in the Illinois Supreme Court without objection, petitioner cannot now complain. *Hood v. Commonwealth Trust and Savings Bank*, 376 Ill. 413, 422, 34 N.E.2d 414 (1941). The issue of whether the Illinois Supreme Court should decide the merits of the case was waived in the Illinois Supreme Court, and therefore not addressed by it. *See, Kravis v. Smith Marine, Inc.*, 60 Ill.2d 141, 147, 324 N.E.2d 417 (1975). Because that issue was not properly raised in State Court and not decided by the State Court, petitioner is barred from asserting it in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928).

Petitioner could have objected when leave to file a motion for reconsideration was sought and also could have objected to review on the merits when the case was briefed and argued in the Illinois Supreme Court. Petitioner had ample opportunity to raise his claim long before he filed a petition for rehearing to the Illinois Supreme Court. Hence, that petition for rehearing is insufficient to raise the question; it does not provide a basis for the exercise of jurisdiction by this Court. *Herndon v. Georgia*, 295 U.S. 441, 443-446 (1935).

B. Petitioner's Claim Is Wholly Without Merit

There is absolutely no merit to petitioner's claim that he was denied due process by the Illinois Supreme Court's decision to reconsider its denial of leave to appeal. Since the early days of our nation this Court has recognized that the establishing of courts of justice, the appointment of judges, and the making of regulations for the administration of justice within each state, according to its laws, on all subjects not entrusted to the federal government, is the province of each state. *Calder v. Bull*, 3 U.S. 38, 387, 3

Dall. 386, 387 (1798). *See also, Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

Petitioner is incorrect in his claim that the Illinois Supreme Court failed to comply with its rules and therefore has somehow violated petitioner's right to due process. On February 6, 1986 the Illinois Supreme Court filed its opinion in *Johnson v. Colley*, 111 Ill.2d 468, 490 N.E.2d 685 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 113, 93 L.Ed.2d 60 (1986). In that decision the same contention asserted by petitioner was addressed. The Court recognized that its standing order instructed the Clerk not to accept or file motions for reconsideration of a denial of leave to appeal, but held that this standing order was not a statement of the Court's infallibility. The Court stated that under the Illinois Constitution it had rulemaking authority sufficiently comprehensive to regulate all aspects of appellate process. *Id.* 111 Ill.2d at 472. The Court stated:

> Recognizing that our authority stems from the Constitution and not from our infallibility, and consistent with precedent (see *Leathe v. Thomas* (1908) 233 Ill. 430), this court, on several occasions, has allowed a motion filed in accordance with Rule 361 (87 Ill.2d R. 361) for leave to file a motion for reconsideration.
>
> *Id.* at 472.

Following that decision, the 1979 order relied upon by petitioner must be read as an order to the Clerk not to file a motion for reconsideration of denial of leave to appeal unless leave to file it has been granted by the Court.

In the present case respondents filed their motion for leave to file a motion for reconsideration more than two weeks after the Court had filed its decision in *Johnson v. Colley*, *supra*. Being familiar with that decision, respondents followed the procedure set forth in it. The Court was not in session and therefore Illinois Supreme Court Rule 361(c)2 Ill.Rev.Stat., 1985, ch. 110A Par. 361(c)2 was applicable. Notwithstanding petitioner's statement to the con-

trary (Petition p. 4), in accordance with Rule 361 respondents mailed the original of their motions to the Clerk of the Illinois Supreme Court with copies to each of the justices at his district chambers. Those motions and the manner in which they were filed and served fully complied with Illinois Supreme Court Rule 361.

Plaintiff's reliance on *Rubin v. Kohn*, 344 Ill. 166, 172, 176 N.E. 259 (1931) is misplaced. That decision does refer to denial of leave to appeal as a final adjudication. But, contrary to plaintiff's statement at page 9 of the petition, that decision does not hold that denial of leave to appeal leaves no jurisdiction for further proceedings. Indeed, as the Court pointed out in *Whitcanock v. Nelson*, 81 Ill.App.3d 186, 189, 400 N.E.2d 998 (2d Dist. 1980), when the mandate has not issued, the appellate courts of Illinois retain jurisdiction to reconsider their orders. In the present case the mandate had not issued and the Illinois Supreme Court unquestionably had jurisdiction.

Petitioner cannot claim that he did not have an opportunity to be heard. He clearly could have opposed respondents motion for leave to file a motion for reconsideration. Petitioner cannot claim he was treated differently than other parties. He was treated exactly the same as the plaintiff in *Johnson v. Colley, supra*, where the Court held that the procedure of which petitioner complains did not violate due process.

Petitioner's claim that allowing respondents to follow the procedure authorized by the Court in *Johnson v. Colley, supra* impermissibly creates two classes of lawyers is patently absurd. (Petition p. 11). Respondents followed a procedure authorized by a published opinion. It is neither a secret nor improper.

In short, petitioner's claim seems to be that he lost so therefore he must have been denied due process and equal protection. This claim is wholly without merit.

II. DISMISSAL OF PETITIONER'S COMPLAINT DID NOT DENY HIM PROCEDURAL DUE PROCESS

A. Petitioner Waived This Claim In The State Trial Court And It Is Therefore Not Properly Before This Court

As discussed in section I.A. of this response, there is no jurisdiction to review a federal question unless that question was both raised and decided in the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

Petitioner now claims that the trial court's dismissal of the complaint on motion denied him procedural due process. But that claim was not made in the trial court. Therefore it was waived and may not be raised on review. *Shell Oil Co., v. Department of Revenue*, 95 Ill.2d 541, 550, 449 N.E.2d 65 (1975). Because this issue could have been raised in the trial court, petitioner's inclusion of it in his petition for rehearing almost six years later is not sufficient to create jurisdiction in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443-446 (1935).

B. Petitioner Was Not Denied An Opportunity To Present Either His Theory Of The Case Or Evidence Relevant To The Issues Decided By The Court

Section II of the petition asserts that petitioner was denied procedural due process because the trial court granted respondents' motions to dismiss. Petitioner claims that he should have had an opportunity to introduce evidence. But it was petitioner who refused to specify any factual basis for his theory, and the issue on which petitioner claims a right to introduce evidence is not an issue that was decided by the Illinois Courts. The evidence petitioner claims a right to present is irrelevant to the basis on which the case was decided.

Illinois law requires fact pleadings. To state a good cause of action a plaintiff must set forth in the complaint

facts necessary for recovery under the theory asserted by him. *Teter v. Clemens*, 112 Ill.2d 252, 492 N.E.2d 1340 (1986); Majority Opinion, 117 Ill.2d at 516, Petition App. pp. 4a-5a. In the present case petitioner not only failed to plead facts sufficient to support a claim of failure to warn, petitioner refused to do so. In the trial court Squibb asserted in its motion to dismiss that petitioner was required to plead some fact that, if true, would show Squibb's written warnings to be inadequate. Petitioner responded as follows:

> In an earlier memoranda plaintiff acknowledges these warnings were discussed, but have not conceded anything in this regard. It is obvious defendant is merely fishing for an admission or denial of a theory from the plaintiff, however no response will be forthcoming from the plaintiff in this regard, as plaintiff is under no obligation to do so.
>
> (R. C 605).

The first sentence in Squibb's written warning states: "The use of this drug may impair the mental and physical abilities required for driving a car or operating heavy machinery." (R. C412, R. C430). Throughout the proceedings in the trial court, including the hearing at which the trial court granted Squibb's motion to dismiss, petitioner's only assertion as to why this warning was inadequate was that Squibb did not communicate it directly to the patient. At that hearing petitioner's counsel also conceded that petitioner had not alleged what was inadequate about the warnings provided by Squibb. *Report of Proceedings*, September 3, 1981 pp. 35-36.

In other words, petitioner was not denied an opportunity to present evidence on any issue of disputed fact. The Courts below ruled on the basis of the allegation that Squibb and SmithKline did not warn the patient directly, but communicated their warnings to the physician. Later, plaintiff conceded and the Illinois Supreme Court held that,

as a matter of law, pharmaceutical manufactures need warn only physicians of the risks associated with their prescription drugs. Hence, dismissal was not based upon a question of fact but an issue of law where presentation of evidence was not relevant.

Contrary to petitioner's assertion, the Illinois Supreme Court did not decide the adequacy of Squibb's warnings. The Court expressly stated that it need not consider the adequacy of the warnings unless plaintiff can meet the "reasonable foreseeability" requirements of strict liability. (Petition App. at 7a-8a). The Court held that, without deciding the adequacy of the warnings, the facts alleged in the complaint demonstrate on their face that plaintiff would never be entitled to recover. (Petition App. at 9a). The Court held that regardless of the adequacy of the warnings they provided to the physicians, Squibb and SmithKline could not have reasonably foreseen that their drugs would be dispensed without those warnings. (Petition App. 9a).

In short, petitioner did not plead any facts that would support a claim of failure to warn adequately. Moreover, the case was not decided on the basis of the adequacy of the warnings. The evidence petitioner now claims a right to introduce had no relevance to the disposition of the case. There is no merit to petitioners claim that his inability to introduce that evidence somehow denied him due process.

III. THE ILLINOIS SUPREME COURT'S DECISION WAS BASED ON STATE LAW – – NOT FEDERAL LAW.

The present case was decided by the Illinois Courts on the basis of state tort law. No federal rights were decided. Hence, there is no basis for review of that decision by this Court. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945); *Michigan v. Long*, 463 U.S. 1032, 1038-1042 (1983).

CONCLUSION

For the above stated reasons, respondent, E.R. Squibb & Sons, Inc., respectfully urges this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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